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Kimberly Reyes

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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P.O. Box 13824
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(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinions

Opinion No. GA-0744

The Honorable Scott Brumley

Potter County Attorney

500 South Fillmore Street, Room 303

Amarillo, Texas 79101

Re: Whether a county auditor may require the county treasurer to obtain prior approval of a transfer of county funds from one account in the county depository to another, or from one investment to another (RQ-0800-GA)

S U M M A R Y

A county auditor may adopt regulations and procedures for transferring county funds from one account in the county depository to another that include preapproval by the auditor. The county auditor may adopt procedures for transferring county funds between county investments to the extent that it does not usurp or unreasonably interfere with the county treasurer's investment authority.

Opinion No. GA-0745

Mr. Sidney "Buck" LaQuey

Grimes County Auditor

Post Office Box 510

Anderson, Texas 77830

Re: Whether a justice of the peace may defer the adjudication of a charge of violating the Parks and Wildlife Code and impose a special expense without assessing a fine and, if so, whether any portion of the special expense must be remitted to the Parks and Wildlife Department (RQ-0802-GA)

S U M M A R Y

A justice of the peace may defer the adjudication of a charge of violating the Parks and Wildlife Code and impose a special expense fee without assessing a fine. A special expense fee imposed under article 45.051, Code of Criminal Procedure, is not a fine under section 12.107, Parks and Wildlife Code, that must be sent to the Parks and Wildlife Department.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200905443
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: November 23, 2009

♦ ♦ ♦

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER E. DATE PALM LETHAL DECLINE QUARANTINE

4 TAC §19.51

The Texas Department of Agriculture is renewing the effectiveness of the emergency adoption of the amendment to §19.51, for a 15-day period. The text of the amended section was originally published in the August 21, 2009, issue of the *Texas Register* (34 TexReg 5625).

Filed with the Office of the Secretary of State on November 18, 2009.

TRD-200905316
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Original Effective Date: August 3, 2009
Expiration Date: December 15, 2009
For further information, please call: (512) 463-4075

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

1 TAC §55.119, §55.120

The Office of the Attorney General, Child Support Division proposes amendments to 1 TAC §55.119 and §55.120, regarding forms for child support enforcement. The proposed amendments reflect revisions made to the Notice of Lien and the National Medical Support Notice as authorized by the U.S. Department of Health and Human Services, Office of Child Support Enforcement.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended sections as proposed are in effect, there will be no significant fiscal implications for state or local government.

Ms. Key has also determined that for each year of the first five years the amended sections as proposed are in effect, the public benefit as a result of the amended sections will be compliance forms authorized by state and federal statutes.

Ms. Key has also determined that for the first five years the amended sections as proposed are in effect, there will be no significant fiscal implications for small businesses or individuals. In addition, there will be no local employment impact as a result of the amended sections as proposed.

Comments on the proposed amendments should be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Child Support Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741 or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendments are authorized under Texas Family Code §231.003, which provides the Office of the Attorney General with the authority to prescribe forms and procedures for the implementation of Chapter 231.

The Texas Family Code, Chapters 154 and 157 are affected by the amended sections.

§55.119. Forms for [~~Child Support Lien~~] Notice of Lien, for Release of Child Support Lien, and for Partial Release of Child Support Lien.

(a) The following form is to be filed with the county clerk of a county in which real or personal property of the obligor is believed to be located in accordance with the Texas Family Code, Chapter 157, Subchapter G. Notice of the lien may be given to any person known to be in possession of real or personal property of the obligor, and if such notice is given the property may not be paid over, released, sold, transferred, encumbered, or conveyed without incurring the penalties provided by the Texas Family Code §157.324.

Figure: 1 TAC §55.119(a)

[~~Figure: 1 TAC §55.119(a)~~]

(b) - (c) (No change.)

§55.120. National Medical Support Notice, Request for Review of National Medical Support Notice, Termination of National Medical Support Notice.

(a) The National Medical Support Notice is federally mandated for use in IV-D cases and may be used in any other suit in which an obligor is ordered to provide health insurance coverage for a child.

Figure: 1 TAC §55.120(a)

[~~Figure: 1 TAC §55.120(a)~~]

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905422

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Earliest possible date of adoption: January 3, 2010

For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER G. AUTHORIZED COSTS AND FEES IN IV-D CASES

1 TAC §55.151

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.151, concerning authorized costs and billing costs and fees in Title IV-D cases. The proposed amendment reflects legislative changes to Texas Family Code and the Texas Government Code. Section 55.151 as proposed clarifies costs and fees that may be charged to the Office of the Attorney General by a clerk of the court.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended section as proposed is in effect, there will be no fiscal implications for state or local government.

Ms. Key also has determined that for each year of the first five years this section as proposed is in effect, the public benefit as a result of the amended section is the clarification of costs and fees in IV-D cases.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no effect on small businesses or individuals. In addition, there will be no local employment impact as a result of the amended sections as proposed.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized under Texas Family Code §231.003, which provides the Office of the Attorney General with the authority to adopt rules for the provision of child support services.

The Texas Family Code, Chapter 231 is affected by the amended section.

§55.151. Authorized Costs and Fees in IV-D Cases.

(a) The clerk of the court may charge the Office of the Attorney General [~~the following~~] costs and fees in Title IV-D cases, including a case filed under Chapter 159 of the Texas Family Code.[~~:~~] Title IV-D Agency shall pay only the following costs and fees:

(1) filing fees and fees for issuance and service of process as provided by Chapter 110 of the Texas Family Code and by Sections 51.317(b)(1), (2), and (3) and (b-1), [~~Section 51.317,~~] 51.318(b)(2) and 51.319(2), Texas Government Code;

(2) - (3) (No change.)

(4) a reasonable fee not to exceed $15 for filing an original administrative writ of withholding. A fee cannot be charged for duplicate copies of an administrative writ of withholding; [~~and~~]

(5) the fee for issuance of a subpoena as provided by §51.318(b)(1), Texas Government Code; and [~~.~~]

(6) a fee authorized under a local rule for electronic filing of documents with a clerk.

(b) The clerk of the court, the sheriff, or a constable may charge the Office of the Attorney General a [~~the~~] fee that sheriffs and constables are authorized to charge [~~for serving process~~] under Section 118.131, Local Government Code for serving each item of process to each individual on whom service is required, including service by certified or registered mail, and a fee authorized under Texas Family Code §157.103(b) for serving a capias. [~~to be paid to the sheriff, constable, or clerk who charged the fee to the Office of the Attorney General whenever service of process is required.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905401

Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER I. STATE DIRECTORY OF NEW HIRES

1 TAC §55.303

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.303, concerning the State Directory of New Hires. The proposed amendment updates contact information for employers with questions regarding the Employer New Hire Reporting Program.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended section as proposed is in effect, there will be no fiscal implications for state or local government.

Ms. Key also has determined that for each year of the first five years the section as proposed is in effect, the public benefit as a result of the amended section is the clarification of contact information regarding the Employer New Hire Reporting Program.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no effect on small businesses or individuals. In addition, there will be no local employment impact as a result of the amended section as proposed.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized under Texas Family Code §234.104 which provides the Office of the Attorney General with the authority to establish by rule procedures for reporting employee information.

The Texas Family Code, Chapter 231 and 234 is affected by the amended section.

§55.303. Employer New Hire Reporting Requirements.

(a) - (d) (No change.)

(e) Employers should send reports for newly hired or rehired employees to Texas Employer New Hire Reporting Operations Center, Post Office Box 149224, Austin, Texas 78714-9224 [~~Telephone Number: 1-800-850-6442 Fax Number: 1-800-732-5015~~].

(f) Questions regarding the Employer New Hire Reporting Program should be directed to [~~the~~] Texas Employer New Hire Reporting [~~Operations Center at 1-800-850-6442 or access Texas Employer New Hire Reporting~~] on the Internet. The Internet address is: http://employer.oag.state.tx.us

(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905402
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER J. VOLUNTARY PATERNITY ACKNOWLEDGMENT PROCESS

1 TAC §55.408

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.408 concerning the Parent Survey on the Acknowledgment of Paternity. The proposed amendment will provide a link to the Office of the Attorney General website for the Parent Survey on the Acknowledgment of Paternity form.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five years the amended section as proposed is in effect, there will be no significant fiscal implications on state or local government as a result of enforcing or implementing the section.

Ms. Key has also determined that for each year of the first five years the amended section is in effect, the public benefit as a result of the proposed section will be access to the form. There will be no significant fiscal implications for small businesses or individuals. In addition, Ms. Key has determined that there will be no local employment impact as a result of the amended section.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741 or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized by Texas Family Code §160.314.

The Texas Family Code, Chapter 160, Subchapter D, Voluntary Acknowledgment of Paternity, and the Health and Safety Code, Chapter 192, Record of Acknowledgment of Paternity, are affected by the amended section.

§55.408. Parent Survey.

(a) Each certified entity must provide the parents (and presumed father, if applicable,) with the opportunity to complete and sign the Parent Survey if the parent was provided the opportunity to voluntarily acknowledge paternity. The Parent Survey on the Acknowledgment of Paternity (AOP) may be found at: http://www.oag.state.tx.us/cs/forms/1798patsurvey.pdf.

(b) (No change.)

(c) The certified entity must retain the parent survey in its files. [~~Figure: 1 TAC §55.408(c)~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

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Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER K. RELEASE OF INFORMATION

1 TAC §55.501

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.501, concerning requests to the IV-D agency for information. The proposed amendment revises language regarding who may request information from the IV-D agency, and the type of information that may be released.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended section as proposed is in effect, there will be no fiscal implications for state or local government.

Ms. Key also has determined that for each year of the first five years the section as proposed is in effect, the public benefit as a result of the amended section is the clarification of who may request information from a IV-D agency.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no effect on small businesses or individuals. In addition, there will be no local employment impact as a result of the amended section as proposed.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized under Texas Family Code §231.003, which provides the Office of the Attorney General with the authority to prescribe forms and procedures for the implementation of Chapter 231.

The Texas Family Code, Chapter 231 is affected by the amended section.

§55.501. Release of Information.

(a) Upon request to the IV-D agency by an authorized person or his or her authorized representative, the IV-D agency may provide the following information:

(1) - (2) (No change.)

(3) copies of correspondence or documents previously provided to the IV-D agency by the authorized person making the request;

(4) copies of correspondence or documents previously provided by the IV-D agency to the authorized person making the request;

(5) - (7) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

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Stacey Napier
Deputy Attorney General
Office of the Attorney General
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For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER L. FINANCIAL INSTITUTION DATA MATCHES

1 TAC §55.555

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.555, concerning the data match for multi-state financial institutions. The proposed amendment updates the Office of Child Support Enforcement (OCSE) contact information for a multi-state financial institution that chooses to facilitate a data match through OCSE.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended section as proposed is in effect, there will be no fiscal implications for state or local government.

Ms. Key also has determined that for each year of the first five years the section as proposed is in effect, the public benefit as a result of the amended section is the clarification of OCSE contact information.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no effect on small businesses or individuals. In addition, there will be no local employment impact as a result of the amended sections as proposed.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized under Texas Family Code §231.001 which provides the Office of the Attorney General with the authority to adopt rules for the provision of child support services.

The Texas Family Code, Chapter 157 is affected by the amended section.

§55.555. Multi-State Financial Institution Data Match Reporting Requirements.

(a) (No change.)

(b) A multi-state financial institution choosing to match through OCSE may contact OCSE at: Office of Child Support Enforcement, Multi-state Financial Institution Data Match, Post Office Box 509, Randallstown, Maryland 21133. Assistance may be found via e-mail at: [~~, For assistance call: 410-277-9312, FAX: 410-277-9325, e-mail:~~] fidm@ssa.gov, or Web site: http://www.acf.hhs.gov/programs/cse/ [~~http://www.acf.dhhs.gov/programs/cse~~].

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905417
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER M. INTERCEPT OF INSURANCE CLAIMS

1 TAC §§55.601 - 55.606

The Office of the Attorney General, Child Support Division proposes amendments to 1 TAC §§55.601 - 55.606, concerning the Insurance Reporting Program pursuant to Texas Family Code §231.015. The proposed amendments are revised to comply with statutory changes by the 81st Legislative Session regarding the intercept of certain liability insurance settlements or awards for claims in the satisfaction of arrearage amounts.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended sections as proposed are in effect, there will be no fiscal implications for state or local government.

Ms. Key also has determined that for each year of the first five years these sections as proposed are in effect, the public benefit as a result of the amended sections are the clarification of procedures regarding the insurance intercept program.

Ms. Key has also determined that for the first five years the amended sections as proposed are in effect, there will be no effect on small businesses or individuals. In addition, there will be no local employment impact as a result of the amended sections as proposed.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendments are authorized under Texas Family Code §231.015.

The Texas Family Code, Chapter 231 is affected by the amended sections.

§55.601. Scope.

(a) Section 231.015 of the Family Code requires the Child Support Division of the Office of the Attorney General, in consultation with the Texas Department of Insurance and representatives of the insurance industry, to operate [~~establish~~] by rule a [~~pilot~~] program whereby an insurer shall [~~insurance companies may voluntarily~~]

cooperate with the Child Support Division in matching the names of insurance claimants [those individuals who are or may be due liability insurance settlements or awards] with the names of obligors who owe past-due child support. When such an individual is identified, the Child Support Division will file a child support lien or withholding order on the claim [pending settlement or award] to secure the payment of past-due support. This subchapter explains how the matching process and the lien process work.

(b) As used in this subsection, "claims" to be reported are claims involving personal injury, personal damages, workers compensation, wrongful or accidental death, and claims by life insurance beneficiaries. Claims involving only property damage need not be reported.

(c) All insurers doing business in Texas, including, but not limited to domestic, foreign and alien companies, self-insurers, and surplus line insurers, are subject to the reporting requirements and shall report all claims regardless of the state where the claim arises or is filed.

§55.602. Child Support Lien Network.

The Office of the Attorney General has contracts with the State of Rhode Island and Providence Plantations to participate in the Child Support Lien Network (CSLN). [Each of the participating states provides CSLN with a periodically updated list of its child support obligors.] CSLN provides an insurer [participating insurance companies] with two methods of matching [a pending settlement or award]: an Automatic Data Match, or an Interactive Lookup [automatic data match, or an interactive lookup]. An insurer subject to this matching process may choose to provide or obtain matching information using either or both the Automated Data Match process or the Interactive Lookup.

§55.603. Automated Data Match.

(a) An insurer [insurance company] can conduct an automatic electronic interface of its pending claims against the list of child support obligors through Insurance Service Office (ISO). ISO is an industry service provider, headquartered in New Jersey, which maintains a claim search system to assist subscribing insurers [insurance companies] in fraud detection.

(b) An insurer participating [insurance company desiring to participate] in the automatic data matching process must give ISO permission to match its claim data with CSLN. ISO may be contacted [at (800) 877-4476 or] by email at njsupport@iso.com.

(c) CSLN matches its list of child support obligors daily against the ISO claim data.

(d) A participating insurer [insurance company] will receive a notice of child support lien (or [wage] withholding instrument for a workers' compensation claim) only on those claims that the insurer [company] has registered with ISO and that match the name of an obligor who owes past-due child support. [This allows the insurance company to focus work efforts on only those claimants that actually require child support enforcement activity.]

§55.604. Interactive Lookup.

(a) An insurer [insurance company] may check the name of an individual insurance claimant to see if there are outstanding child support obligations by accessing the CSLN database of child support obligors.

(b) To register for access to this database, an insurer [a company] must:

(1) go to the Child Support Lien Network [Office of the Attorney General's child support lien] web page at http://www.childsupportliens.com/ [http://www.childsupportliens.com/TX/];

(2) click on the FAQ tab at the top of the web page and select the question regarding registration; [ARegister@ label in the left margin and complete and electronically submit the registration form; and]

(3) complete and electronically submit the registration form and confidentiality statement. [print, sign and fax to CSLN at 888-430-6907 a copy of the confidentiality statement.]

(c) Once the insurer [insurance company] registration information and confidentiality statement has been reviewed [and the signed confidentiality statement has been received], secure access to the database of child support obligors will be approved. The insurer [company] will be notified via e-mail of access approval. This notice will include the user ID that has been assigned, the web site address, and basic instructions.

(d) Unless the insurer is participating in the Automated Data Match, the insurer should [Insurance companies are encouraged to] query the CSLN database of child support obligors as early as possible in the claims process, and shall query the CSLN database [but] not later than 30 days before a claim is paid [settlement, if possible].

(e) The insurer [insurance company] receives immediate notification of the status of the match.

(1) If there is no match, the insurer [insurance company] is informed.

(2) If there is a positive match, the insurer [insurance company] is informed and provided the basic match data.

(3) If there are multiple possible matches within one state, the insurer [insurance company] is asked to call CSLN to identify the correct obligor.

(4) If there are multiple possible matches within more than one state, the insurer [insurance company] is notified that CSLN will work with the insurer [insurance company] and the affected states to determine the appropriate course of action.

(f) When an interactive match occurs, CSLN notifies the State child support enforcement agency of a match. The State child support agency will send a notice of child support lien (or, in the case of a worker's compensation claim, a [wage] withholding instrument) to the insurer [company].

§55.605. Protection from Liability of Insurer [Insurance Company] for Disclosure of Information.

[(a)] An insurer [insurance company] that provides information or otherwise responds to a notice of child support lien or levy under Subchapter G, Chapter 157, or acts in good faith to comply with procedures established in the [pilot] program under §231.015 [this Section 231.015] is not liable for those acts under any law to any person.

[(b) The federal Social Security Act (42 USC 666(a)(17)(C)(ii)) provides that a financial institution shall not be liable under any federal or state law to any person for encumbering or surrendering any assets it holds in response to a notice of lien or levy issued by the State child support enforcement agency.]

§55.606. Confidentiality and Security.

(a) The Title IV-D agency shall consider any information received from an insurer [insurance company] as confidential. Such information shall be used or disclosed by the Child Support Division only for the purpose of collecting past-due child support or for other purposes as enumerated in subsection (c) of Family Code §231.108.

(b) In accordance with §453 [section 453] of the federal Social Security Act, any information provided by the Child Support Division

to an insurer [~~insurance company~~], or its designated agent, for the purpose of conducting a data match may not be used by the insurer [~~institution~~] or its agent for any other purpose and may not be disclosed to any person except to the extent necessary to conduct the data match. The insurer [~~insurance company~~] or its agent shall destroy or erase all information provided to the insurer [~~company~~] after completion of a data match. This subsection does not apply to data contained in a child support lien or other encumbering instrument received from the Child Support Division after the data match process.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905378
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

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SUBCHAPTER N. NATIONAL MEDICAL SUPPORT NOTICE

1 TAC §55.705

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.705, concerning the National Medical Support Notice. The proposed amendment reflects legislative changes to Texas Family Code §154.187(c)(1) and clarifies the responsibilities of the employer regarding the use of the National Medical Support Notice in the enforcement of health care coverage.

Alicia G. Key, Deputy Attorney General for the Child Support Division, has determined that for the first five-years the amended section as proposed is in effect, there will be no fiscal implications for state or local government.

Ms. Key also has determined that for each year of the first five years the section as proposed is in effect, the public benefit as a result of the amended section is the clarification of procedures regarding the National Medical Support Notice.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no effect on small businesses or individuals. In addition, there will be no local employment impact as a result of the amended sections as proposed.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized under Texas Family Code §154.186, which provides the Office of the Attorney General with the authority to prescribe forms and procedures consistent with federal law for use of the National Medical Support Notice.

The Texas Family Code, Chapter 154 is affected by the amended section.

§55.705. Employer Responsibilities.

(a) If the child cannot be enrolled in the employer health insurance plan because the employer does not maintain a plan, the employee is not eligible, or the employee is no longer employed by the employer, the employer must complete the Employer Response Form and provide the employer representative information to the Title IV-D Agency within 20 business days of receipt of the Notice.

(b) - (f) (No change.)

(g) If the child is enrolled in the employer's health plan, or is already enrolled in another health insurance plan in accordance with a previous child support or medical support order to which the child is subject, the employer must provide this information by first class mail to the IV-D agency. The statement must be sent no later than 30 days after the date the employer receives the National Medical Support Notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905418
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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SUBCHAPTER O. STATE DISBURSEMENT UNIT

1 TAC §55.804

The Office of the Attorney General, Child Support Division proposes an amendment to 1 TAC §55.804 concerning the disbursement of child support payments to the obligee through direct deposit or the Texas Debit Card system. The proposed amendment reflects legislative changes to Texas Family Code §234.010 and will clarify procedures for the obligee regarding electronic disbursement of child support.

Alicia G. Key, Attorney General for the Child Support Division, has determined that for the first five years the section as proposed is in effect, there will be no significant fiscal implications for state or local government as a result of enforcing or implementing the sections.

Ms. Key has also determined that for each year of the first five years the section is in effect, the public benefit as a result of the new section will be compliance with state and federal requirements. There will be no significant fiscal implications for small businesses or individuals. In addition, Ms. Key has determined that there will be no local employment impact as a result of the new section.

Comments may be submitted to Kathy Shafer, Deputy Director, Legal Counsel Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741 or (mail-

ing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment is authorized by Texas Family Code §234.006.

The amendment as proposed affects Texas Family Code Chapter 234, State Case Registry, Disbursement Unit and Directory of New Hires, Subchapter A.

§55.804. Methods of Disbursement.

(a) The OAG's Child Support Division will disburse child support payments to an obligee by electronic funds transfer either by direct deposit into an account maintained by the obligee in a financial institution or through the Texas Debit Card system unless the obligee has signed an Authorization for Release of Information Form (1A004) to allow payments to be sent to a private collection agency or other third party.

(b) An obligee may choose to receive their child support payment through direct deposit into their bank account by completing the Direct Deposit Application Form (6A002). [~~opt out of the Texas Debit Card program and receive a state warrant by calling 1-866-729-6159.~~]

(c) An obligee may decline to receive payments by electronic funds transfer and request payment by paper warrants if the obligee alleges in writing that receiving payments by electronic funds transfer would impose a substantial hardship. [~~choose to receive their child support payment through direct deposit into their bank account by completing the Direct Deposit Application Form (6A002).~~]

(d) If an obligee fails to notify the State Disbursement Unit of the existence of an account maintained with a financial institution, or closes an account maintained with a financial institution previously used to accept direct deposit of a child support payment, without establishing a new account and informing the State Disbursement Unit, the Title IV-D Agency will issue a debit card and provide the obligee with instructions for activating and using the debit card.

(e) [~~(d)~~] An obligee who has signed an Authorization for Release of Information Form (1A004) must revoke that authorization by signing a Revocation of Authorization for Release of Information Form (1A005) to receive their payments through the Texas Debit Card.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stacey Napier
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 3, 2010
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 159. RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION HEARINGS

SUBCHAPTER C. WITNESSES AND SUBPOENAS

1 TAC §159.101

The State Office of Administrative Hearings (SOAH) proposes an amendment to Subchapter C, Witnesses and Subpoenas, §159.101 (concerning Breath Test Operator and Technical Supervisor). The amendment is a result of the passage of House Bill (HB) 2730 (81st Legislature, 2009), §3.01, which amended Transportation Code, Chapter 524, §524.039 to restrict the circumstances under which the person who requests a hearing may require the attendance at the hearing of the breath test operator or the breath test technical supervisor. In accordance with HB 2730, the proposed amendment will require a person seeking to mandate the attendance of these individuals to apply to SOAH for issuance of a subpoena. The amendment will also provide guidance on the circumstances that constitute good cause for issuance of a subpoena and the procedures for demonstrating them. Prior to the passage of HB 2730, neither a subpoena nor a showing of good cause were required in order to compel the attendance of these individuals.

Kerry D. Sullivan, General Counsel, has determined that for the first five-year period the amended rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendment.

Mr. Sullivan also has determined that for the first five-year period the amended rule is in effect the public benefit anticipated as a result of the rule will be in establishing procedures and guidance for parties to comply with the requirements of HB 2730. There will be no effect on small businesses as a result of enforcing the rule. The proposed amendment will have no fiscal impact on small businesses, and there is no anticipated economic cost to individuals who are required to comply with the amended rule.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Debra Anderson, Paralegal, State Office of Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025, or by email at debra.anderson@soah.state.tx.us, or by facsimile to (512) 463-1576.

The amendment is proposed under Government Code, Chapter 2003, which authorizes the State Office of Administrative Hearings to conduct contested case hearings, Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures, and §2003.050, which requires SOAH to adopt rules governing the procedures, including discovery procedures, that relate to a hearing conducted by SOAH.

The amendment affects Government Codes, Chapters 2001, 2003, and Transportation Code Chapter 524.

§159.101. Breath Test Operator and Technical Supervisor.

(a) A request for the issuance of a subpoena for the appearance of a breath test operator or technical supervisor shall include an affidavit based on personal knowledge establishing a genuine issue concerning the validity of the breath test that requires the appearance of the witness to resolve. A request for subpoena that is not granted prior to the hearing may be re-urged at the hearing if the evidence raises such an issue. If the ALJ grants the request during the hearing, the hearing shall reconvene at a later date for the appearance of the witness.

(b) The provisions found at §159.103(a), (d), (f)(1), (3), and (4), (g)(3), (h) and (i) of this title (relating to Subpoenas) also apply to this section.

~~[(a) Upon receipt of a timely request for the appearance of the certified breath test operator who administered the test and obtained the defendant's specimen to determine the level of alcohol concentration in the defendant's body and/or the certified breath test technical supervisor, DPS shall ensure that the requested individuals appear at the hearing. If the requested witness does not appear without good cause, the results of the test will not be admitted into evidence. If good cause is established for the witness's failure to appear, DPS will be entitled to a continuance.]~~

~~[(b) Requests for witnesses under this section are limited to cases under Texas Transportation Code §522.081(b)(4) and §522.081(d)(3)(C) and Chapter 524.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905363
Kerry D. Sullivan
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 475-4931

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 104. PROCEDURE FOR REVIEW OF APPLICATIONS

7 TAC §104.7

The Texas State Securities Board proposes new §104.7, concerning preliminary evaluation of license eligibility. Related amendments are being concurrently proposed to §115.6 and §116.6, concerning registration of persons with criminal backgrounds, to cross-reference this new procedure.

The new section would implement the provisions of House Bill 963 (HB 963) passed during the 2009 Regular Session of the Legislature that added Subchapter D to Chapter 53 of the Texas Occupations Code. HB 963 provides a means for a potential applicant to obtain preliminary information regarding their eligibility for an occupational license before they begin a training program for that occupation and allows a licensing authority to charge a fee to a person requesting a criminal history evaluation letter.

The new section outlines the procedure for a person considering applying for a license to request a criminal history evaluation letter; lists the required information that must be submitted by the requestor to the Agency; and sets a fee of $100 for the request. The factors in subsection (b) track those in the Agency's rules regarding registration of persons with criminal backgrounds. Within 90 days after receipt of all information needed to make a decision on the request, the Agency would be required to: (1) notify the requestor in writing that a ground for ineligibility does not exist or (2) issue a letter setting out each basis for a potential ineligibility. If the Agency determines that a ground for ineligibility does not exist, the letter must notify the requestor of the Agency's determination on each ground of potential ineligibility. If the Agency determines that the requestor is ineligible for a license, the letter must set forth each basis for potential ineligibility and the Agency's determination as to eligibility. Under the new law, the Agency has the same authority to investigate a person requesting a preliminary evaluation as it currently has to investigate a person applying for a license. If the requestor knows of evidence not disclosed by the requestor or not reasonably available to the Agency at the time the determination letter is issued, the ruling on the request would be restricted only to the grounds for potential ineligibility set out in the letter. New evidence would be subject to further consideration if it was subsequently brought to the Agency's attention by the requestor (prior to or at the time an application is filed) or if an application was filed and the new evidence was discovered by the Agency in the routine process of reviewing an application.

Patty Loutherback, Director, Registration Division, Joe Rotunda, Director, Enforcement Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to establish a procedure for individuals to request a criminal history evaluation letter as required by HB 963 prior to the application process. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to David Weaver, General Counsel, Texas State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The new rule is proposed under Texas Civil Statutes, Article 581-28-1 and Texas Occupations Code, Chapter 53, Subchapter D. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Texas Occupations Code, Chapter 53, Subchapter D, authorizes a person requesting an evaluation letter to be charged a fee sufficient to cover the costs of administration. HB 963 requires an agency issuing a license to practice or engage in a particular business, profession, or occupation to adopt rules necessary to administer Texas Occupations Code, Chapter 53, Subchapter D.

The proposal affects Texas Occupations Code, Chapter 53, Subchapter D and Texas Civil Statutes, Article 581-14.

§104.7. Preliminary Evaluation of License Eligibility.

(a) Request for criminal history evaluation letter.

(1) A person may request the Agency issue a criminal history evaluation letter regarding the person's eligibility for a license issued by the Agency if the person:

(A) is enrolled or planning to enroll in an educational program that prepares a person for an initial license or is planning to take an examination for an initial license; and

(B) has reason to believe that the person is ineligible for the license due to a conviction or deferred adjudication for a felony or misdemeanor offense.

(2) The request must state the basis for the person's potential ineligibility, provide the information set out in subsection (b) of this section, include all pertinent court documentation including certified copies of all court indictments and/or judgments, and orders, and an explanation of the circumstances and events of the criminal action that led to the conviction or sentence.

(3) The fee for a preliminary evaluation of license eligibility shall be $100.

(4) To be considered complete, the request must include the appropriate fee and state the circumstances establishing the requestor's eligibility under paragraph (1) of this subsection.

(5) The Agency may require additional documentation including fingerprint cards before issuing a criminal history evaluation letter.

(6) If a requestor does not provide all required and requested documentation within one year of submitting the original request, the requestor must submit a new request along with appropriate fee.

(b) Factors considered. The Agency considers the following evidence in determining the present fitness of an applicant who has been convicted of a crime. Accordingly, the requestor should provide information on the following:

(1) The extent and nature of the person's past criminal activity.

(2) The age of the requestor at the time of the commission of the crime.

(3) The amount of time that has elapsed since the requestor's last criminal activity.

(4) The conduct and work activity of the requestor prior to and following the criminal activity.

(5) Evidence of the requestor's rehabilitation or rehabilitative effort while incarcerated or following release.

(6) Other evidence of the requestor's present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the requestor; the sheriff and chief of police in the community where the requestor resides; and any other persons in contact with the requestor.

(7) It shall be the responsibility of the requestor to the extent possible to secure and provide to the Agency the recommendation of the prosecution, law enforcement, and correctional authorities as required under this section. The requestor shall also furnish proof to the Agency that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted.

(c) Investigation of request. The Agency has the same authority to investigate a request submitted under this section as it has to investigate a person applying for a license.

(d) Determination of eligibility; letter.

(1) If the Agency determines that a ground for ineligibility does not exist, the Agency shall notify the requestor in writing of the Agency's determination on each ground of potential ineligibility.

(2) If the Agency determines that the requestor is ineligible for a license, the Agency shall issue a letter setting out each basis for potential ineligibility and the Agency's determination as to eligibility.

(3) In the absence of new evidence known to but not disclosed by the requestor or not reasonably available to the Agency at the time the letter is issued, the Agency's ruling on the request determines the requestor's eligibility with respect to the grounds for potential ineligibility set out in the letter.

(4) The notice under paragraph (1) of this subsection or the letter under paragraph (2) of this subsection shall be issued by the Agency within 90 days of the requestor satisfying all of the Agency's requests for information to complete the criminal history evaluation letter request.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905413
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 305-8303

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CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.6

The Texas State Securities Board proposes an amendment to §115.6, concerning registration of persons with criminal backgrounds. The amendment adds a cross-reference to §104.7, concerning preliminary evaluation of license eligibility, which is being concurrently proposed.

Patty Loutherback, Director, Registration Division, Joe Rotunda, Director, Enforcement Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to apprise persons with criminal backgrounds of the availability of a preliminary evaluation of license eligibility prior to applying for registration. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to David Weaver, General Counsel, Texas State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Occupations Code, Chapter 53, Subchapter D and Texas Civil Statutes, Article 581-14.

§115.6. Registration of Persons with Criminal Backgrounds.

(a) - (c) (No change.)

(d) Prior to filing an application, a person may request a preliminary evaluation of license eligibility from the State Securities Board by following the procedure set out in §104.7 of this title (relating to Preliminary Evaluation of License Eligibility) and paying the requisite fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905414
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.6

The Texas State Securities Board proposes an amendment to §116.6, concerning registration of persons with criminal backgrounds. The amendment adds a cross-reference to §104.7, concerning preliminary evaluation of license eligibility, which is being concurrently proposed.

Patty Loutherback, Director, Registration Division, Joe Rotunda, Director, Enforcement Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback, Mr. Rotunda, and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to apprise persons with criminal backgrounds of the availability of a preliminary evaluation of license eligibility prior to applying for registration. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to David Weaver, General Counsel, Texas State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Occupations Code, Chapter 53, Subchapter D and Texas Civil Statutes, Article 581-14.

§116.6. Registration of Persons with Criminal Backgrounds.

(a) - (c) (No change.)

(d) Prior to filing an application, a person may request a preliminary evaluation of license eligibility from the State Securities Board by following the procedure set out in §104.7 of this title (relating to Preliminary Evaluation of License Eligibility) and paying the requisite fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905415
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 305-8303

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.461, §26.465

The Public Utility Commission of Texas (commission) proposes amendments to §26.461, relating to Access Line Categories,

and §26.465, relating to the Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers. The commission proposes to redefine the term "access line" and the categories of access lines in §26.461 of this title pursuant to Texas Local Government Code §283.003 and §26.465(m). Local Government Code §283.003 permits the commission to "modify the definition of 'access line' and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities." Specifically, the commission proposes to amend the definition of access line to insure that both switched and non-switched transmission paths are treated the same when providing multiple station service over digital or analog high speed facilities and amend the definition to insure that any end-use customers capable of making or receiving calls that, in whole or in part, originate or terminate through the public right-of-way of the public switched network, are treated the same as it pertains to the assessment of right-of-way (ROW) fees for residential, business, or private line use. These amendments are necessary in order to address the impact of recent technological changes and advancements in the delivery of telecommunications services to and from end-use customers through the public switched network and within the ROW of local municipal governments. The proposed amendments will make minor changes to categories of access lines for clarification purposes and will amend counting requirements for telecommunications companies required to collect ROW fees to correspond with the changed definition of access line. In addition, material that is now obsolete is either rearranged or deleted as necessary and appropriate. Project Number 37498 has been assigned to this proceeding.

John Costello, Senior Rate Analyst, Rate Regulation Division, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. However, if providers are now included in the definition or reclassified as a result of a definitional change, then local governments may see an increase in revenue.

Mr. Costello has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be a competitively neutral and nondiscriminatory process for the assessment and collection of ROW fees. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these amendments. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Costello has also determined that for each year of the first five years the amendments are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for a public hearing must be received no later than January 4, 2010 (31 days after publication).

Initial comments on the amendments may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, by January 4, 2010, (31 days after publication), and reply comments may be submitted no later than January 18, 2010 (45 days after publication). Sixteen copies of comments on the amendments are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the amended rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the amendments. The commission will consider the costs and benefits in deciding whether to adopt the amendments. All comments should refer to Project Number 37498.

The commission invites specific comments on the commission's jurisdiction to affect the total amount that a municipality collects as access line fees.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. These amended sections are also proposed under the Texas Local Government Code §283.003 (Vernon 2007 and Supp. 2009), which permits the commission to periodically modify the definition of access line to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation to the municipalities; and §283.058 which grants the commission the jurisdiction over municipalities and certificated telecommunications providers necessary to enforce Local Government Code §283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner.

Cross Reference to Statutes: PURA §14.002 and Texas Local Government Code §283.003 and §283.058.

§26.461. Access Line Categories.

(a) - (b) (No change.)

(c) Definitions. The following words and terms when used in this subchapter[,] shall have the following meaning, unless the context clearly indicates otherwise.

(1) Access lines--

(A) means a unit of measurement representing:

(i) - (ii) (No change.)

(iii) each switched or nonswitched transmission path within a public right-of-way used to provide central office-based PBX-type services, or stand-alone PBX-type services, for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every 10 stations served; except that the number of paths shall not exceed 24 for each T-1 serving the stations; or

(iv) any other line or communications medium that could be construed as a line or path not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service to end-use customers, that allows such end-use customers to make and/or receive calls that, in whole or in part, originate or terminate through or on the public switched network, without regard to the technology used to facilitate the transmission. The transmission may be delivered by means of owned facilities, unbundled network elements, [~~or~~] leased facilities,

[~~or~~] resale, or any other facility or medium that, in whole or in part, traverses the public switched network.

(B) (No change.)

(2) - (6) (No change.)

(d) Access line categories. There shall be three categories of access lines. The three categories shall be as follows:

(1) - (2) (No change.)

(3) Category 3 shall include all other point-to-point private lines, whether residential or non-residential, not otherwise included within category 1 or 2.

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(a) - (b) (No change.)

(c) Definitions. The following words and terms when used in this section[~~,~~] shall have the following meaning, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Transmission path--A path within the transmission media that allows the delivery of switched local exchange service or provides voice service.

(A) - (D) (No change.)

(E) Where service or technology is not channelized by the CTP, each transmission path shall be determined in a manner consistent with that of Central Office PBX type services *(e.g.,* one transmission path shall be represented for every ten stations served, except that the number of paths shall not exceed 24 for each T-1 serving the stations).

(F) [~~(E)~~] Voice service provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path.

(3) (No change.)

(d) (No change.)

(e) Lines to be counted. A CTP shall count the following access lines:

(1) - (9) (No change.)

(10) all lines that provide voice service to end-use customers that allow such end-use customers to make and/or receive calls that, in whole or in part, originate or terminate through or on the public switched network, without regard to the technology used to facilitate the transmission. The transmission may be delivered by means of owned facilities, unbundled network elements, leased facilities, resale, or any other facility or medium that, in whole or in part, traverses the public switched network [~~delivered by means of owned facilities, unbundled network elements or leased facilities, or resale~~] that are not otherwise counted under paragraphs (1) - (9) of this subsection.

(f) (No change.)

(g) Reporting procedures and requirements.

[~~(1)~~] Who shall file. The record keeping, reporting and filing requirements listed in this section or in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting) shall apply to all CTPs in the State of Texas. A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.

[~~(2) Initial reporting requirements.~~]

[~~(A) No later than January 24, 2000, a CTP shall file its access line count using the commission-approved Form for Counting Access Line or Program for Counting Access Lines with the commission. The CTP shall report the access line count as of December 31, 1998, except as provided in subparagraph (C) of this paragraph.~~]

[~~(B) A CTP shall not include in its initial report any access lines that are resold, leased, or otherwise provided to a CTP, unless it has agreed to a request from another CTP to include resold or leased lines as part of its access line report.~~]

[~~(C) A CTP that cannot file access line count as of December 31, 1998 shall file request for good cause exemption and shall file the most recent access line count available for December, 1999.~~]

[~~(D) A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.~~]

(h) - (l) (No change.)

(m) Commission review of the definition of access line.

(1) The commission, on its own motion, shall make the determination required by this subsection at least once every three years.

(2) [~~(1)~~] Pursuant to the Local Government Code §283.003[~~, not later than September 1, 2002,~~] the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the adoption of the definition of "access line" provided by §26.461 of this title. [~~The commission may not begin a review authorized by this subsection before March 1, 2002.~~]

(3) [~~(2)~~] As part of the proceeding described by paragraph (2) [~~(1)~~] of this subsection, and as necessary after that proceeding, the commission by rule may modify the definition of "access line" as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation[~~,~~] as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities.

[~~(3) After September 1, 2002, the commission, on its own motion, shall make the determination required by this subsection at least once every three years.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905389
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.317

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.317 ("Powerball®" On-Line Game Rule), a multijurisdictional lottery game. The purposes of the rule are to meet the requirements of the reciprocal multijurisdictional game Agreement between the Texas Lottery Commission and the Multi-State Lottery Association (MUSL) and to generate revenue for the Foundation School Fund. This rule will establish the game rules for the Powerball game in Texas. Powerball is an on-line multijurisdiction lottery game in which 33 jurisdictions participate and in which another 12 jurisdictions, including Texas, are considering or preparing to participate in order to pool sales from each jurisdiction so that larger jackpot amounts can be generated for the benefits of the respective states. Large jackpots tend to increase sales and higher sales volumes tend to increase jackpots. As a result of the interplay between sales and jackpot amounts, the respective jurisdictions are able to generate additional revenue for the purposes served by the lotteries in each of the jurisdictions. In Texas, revenue from the sale of lottery tickets is deposited in the Foundation School Fund.

Kathy Pyka, Controller, has determined that the Powerball rule will result in an estimated $162.7 million for the first five year period. The fiscal impact for each year of the first five years the rule is in effect is as follows: FY 2010, $20.7M; FY 2011, $35.5M; FY 2012, $35.5M; FY 2013 $35.5M; FY 2014, $35.5M. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of Lottery Operations, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated will be increased revenue for the Foundation School Fund.

The Commission requests comments on the new rule from any interested person. Comments on the proposed rule may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 1:00 p.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under the authority of the Texas Constitution, Article III, Section 47(e), Texas Government Code §§466.451, 466.452, and 466.453, which provide the Commission with the authority to enter into agreements for multijurisdictional lotteries, share costs of multijurisdictional lotteries, and adopt rules relating to a multijurisdictional lottery game or games. The new rule is also proposed under Texas Government Code, §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery, and under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.317. "Powerball®" On-Line Game Rule.

(a) Powerball. Powerball is a Multi-State Lottery Association (MUSL) on-line game, which has been opened to the participation of the twelve states now conducting the Mega Millions on-line games, and with which the Texas Lottery Commission has elected to participate under an Agreement with MUSL (hereinafter called the Reciprocal Game Agreement.) "Powerball" is authorized to be conducted by the executive director under the conditions of the Reciprocal Game Agreement, MUSL rules, the laws of the State of Texas, this section, and under such further instructions, directives, and procedures as the executive director may issue in furtherance thereof. In this regard, the executive director is authorized to issue such further instructions and directives as may be necessary to conform the conduct and play of Powerball to the requirements of the Reciprocal Game Agreement, if, in the opinion of the executive director, such instructions, directives, and procedures are in conformance with state law. If a conflict arises between this section and §401.304 of this chapter (relating to On-Line Game Rules (General)), this section shall have precedence. The purpose of the Powerball game is the generation of revenue for MUSL Party Lottery members and Party Lotteries participating under the Reciprocal Game Agreement, through the operation of a specially designed multi-jurisdiction lottery game that will award prizes to ticket holders matching specified combinations of numbers randomly selected in regularly scheduled drawings. In addition to other applicable rules contained in Chapter 401, this section and definitions apply unless the context requires a different meaning or is otherwise inconsistent with the intention of the rules adopted by the MUSL or the MUSL Powerball Group.

(b) Definitions.

(1) "Agent" or "retailer" means a person or entity authorized by the Texas Lottery Commission (TLC) to sell lottery tickets.

(2) "Quick Pick" means the random selection of numbers by the terminals that are printed on a ticket and are played by a player in the game.

(3) "Drawing" means the formal process of selecting winning numbers which determine the number of winners for each prize level of the game.

(4) "Game board", "board", "panel, or "playboard" means that area of the play slip, which contains two sets of numbered squares to be marked by the player, the first set containing fifty-nine (59) squares, number one (1) through fifty-nine (59) and the second set containing thirty-nine (39) squares, number one (1) through thirty-nine (39).

(5) "Game ticket" or "ticket" means an acceptable evidence of play, which is a ticket produced by a terminal and meets the specifications defined in the MUSL rules or the rules of each member or participating Party Lottery (Ticket Validation).

(6) "Match 5 Bonus Prize" means the bonus money won when a Grand Prize has reached a new high level and bonus prize monies have been declared by the MUSL Powerball Group under their Rules. The Match 5 Bonus Prize does not include the original amount declared for the Match 5 Prize.

(7) "MUSL" means the Multi-State Lottery Association, an association of governmental lotteries.

(8) "MUSL Board" means the governing body of the MUSL which is comprised of the chief executive officer of each Party Lottery member of MUSL. It does not include participating non-members.

(9) "On-Line Lottery Game" means a lottery game which utilizes a computer system to administer plays, the type of game, and amount of play for a specified drawing date, and in which a player either selects a combination of numbers or allows number selection by a random number generator operated by the terminal, referred to as Quick Pick. MUSL will conduct a drawing to determine the winning combination(s) in accordance with the Powerball rules and the Powerball drawing procedures.

(10) "Party Lottery" means a state lottery or lottery of a political jurisdiction or entity which is a member of MUSL, or is a participating lottery, participating in Powerball pursuant to the Reciprocal Game Agreement with MUSL, and, in the context of these rules and the MUSL Powerball Group Rules, that has joined in selling the Powerball game or games.

(11) "Play" or "bet" means the six (6) numbers, the first five (5) from a field of fifty-nine (59) numbers and the last one (1) from a field of thirty-nine (39) numbers, that appear on a ticket as a single lettered selection and are to be played by a player in the game.

(12) "Play slip" or "bet slip" means an optically readable card issued by the Commission used by players of Powerball to select plays and to elect all features. There shall be five play boards on each playslip. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(13) "Powerball Group" means the MUSL member group of lotteries which has joined together to offer the Powerball product pursuant to the terms of the Multi-State Lottery Agreement and the Powerball Group's rules, including the MUSL Powerball Drawing Procedures. In these rules, wherever the term "Powerball Group" is used it is referring to the MUSL Powerball Group.

(14) "Prize" means an amount paid to a person or entity holding a winning ticket. "No advertised Grand Prize in a Powerball game is a guaranteed amount, and all advertised prizes, even Set Prizes, are estimated amounts."

(15) "Set Prize" means all other prizes except the Grand Prize that are advertised to be paid by a single cash payment and, except in instances outlined in this section, will be equal to the prize amount established by the MUSL Board for the prize level.

(16) "Terminal" means a device authorized by a Party Lottery to function in an on-line, interactive mode with the lottery's computer system for the purpose of issuing lottery tickets and entering, receiving, and processing lottery transactions, including purchases, validating tickets, and transmitting reports.

(17) "Winning numbers" means the six (6) numbers, the first five (5) from a field of fifty-nine (59) numbers and the last one (1) from a field of thirty-nine (39) numbers, randomly selected at each drawing, which shall be used to determine winning plays contained on a game ticket.

(c) Game Description.

(1) Powerball is a five (5) out of fifty-nine (59) plus one (1) out of thirty-nine (39) on-line lottery game, drawn every Wednesday and Saturday, which pays the Grand Prize, at the election of the player made in accordance with this rule or by a default election made in accordance with this rule, either on an annuitized pari-mutuel basis or as a cash lump sum payment of the total cash held for this prize pool on a pari-mutuel basis. Except as provided in this section, all other prizes are paid on a set cash basis. To play Powerball, a player shall select five (5) different numbers, from one (1) through fifty-nine (59) and one (1) additional number from one (1) through thirty-nine (39), for input into a terminal. The additional number may be the same as one of the first five numbers selected by the player. Tickets can be purchased for one dollar (U.S. $1.00), including any specific statutorily-mandated tax of a Party Lottery to be included in the price of a lottery ticket, either from a terminal operated by an agent (i.e., a clerk activated terminal) or from a terminal operated by the player (i.e., a player activated terminal). If purchased from an agent, the player may select a set of five numbers and one additional number by communicating the six (6) numbers to the agent, or by marking six (6) numbered squares in any one game board on a play slip and submitting the play slip to the agent or by requesting "quick picks" from the agent. The agent will then issue a ticket, via the terminal, containing the selected, or terminal generated, set or sets of numbers of numbers, each of which constitutes a game play. Tickets can be purchased from a player activated terminal by use of a touch screen or by inserting a play slip into the machine.

(2) Claims. A ticket (subject to the validation requirements set forth in subsection (g) of this section (Ticket Validation)) shall be the only proof of a game play or plays and the submission of a winning ticket to the issuing Party Lottery or its authorized agent shall be the sole method of claiming a prize or prizes. A play slip has no pecuniary or prize value and shall not constitute evidence of ticket purchase or of numbers selected. A terminal produced paper receipt has no pecuniary or prize value and shall not constitute evidence of ticket purchase or of numbers selected.

(3) Cancellations Prohibited. A ticket may not be voided or canceled by returning the ticket to the selling agent or to the lottery, including tickets that are printed in error. No ticket which can be used to claim a prize shall be returned to the lottery for credit. Tickets accepted by retailers as returned tickets and which cannot be re-sold shall be deemed owned by the bearer thereof.

(4) Player Responsibility. It shall be the sole responsibility of the player to verify the accuracy of the game play or plays and other data printed on the ticket. The placing of plays is done at the player's own risk through the on line agent who is acting on behalf of the player in entering the play or plays.

(5) Entry of Plays. Plays may only be entered manually using the lottery terminal keypad or touch screen or by means of a play slip provided by the Party Lottery and hand-marked by the player or by such other means approved by the Party Lottery. Retailers shall not permit the use of facsimiles of play slips, copies of play slips, or other materials that are inserted into the terminal's play slip reader that are not printed or approved by the Party Lottery. Retailers shall not permit any device to be connected to a lottery terminal to enter plays, except as approved by the Party Lottery.

(6) Subscription sales. A subscription sales program may be offered, at the discretion of the executive director.

(d) Prize Pool.

(1) Prize Pool. The prize pool for all prize categories shall consist of fifty percent of each drawing period's sales, including any specific statutorily-mandated tax of a Party Lottery to be included in the price of a lottery ticket, after the prize reserve accounts are funded to the amounts set by the Powerball Group. Any amount remaining in the prize pool at the end of this game shall be carried forward to a replacement game or expended in a manner as directed by the Powerball Group in accordance with state law.

(2) Prize Reserve Accounts. An amount equal to up to two percent of a Party Lottery's sales, including any specific statutorily-mandated tax of a Party Lottery to be included in the price of a lottery ticket, shall be deducted from a Party Lottery's Grand Prize Pool and placed in trust in one or more prize reserve accounts until the Party Lottery's share of the prize reserve account(s) reaches the amounts des-

ignated by the Powerball Group. Once the Party Lottery's share of the prize reserve accounts exceeds the designated amounts, the excess shall become part of the Grand Prize Pool. The Powerball Group, with approval of the MUSL Finance and Audit Committee, may establish a maximum balance for the prize reserve account(s). The Powerball Group may determine to expend all or a portion of the funds in the accounts for the payment of prizes or special prizes in the game; subject to the approval of the MUSL Finance and Audit Committee. The shares of a Party Lottery may be adjusted with refunds to the Party Lottery from the prize reserve account(s) as may be needed to maintain the approved maximum balance and shares of the Party Lotteries. Any amount remaining in a prize reserve account at the end of this game shall be carried forward to a replacement prize reserve account or expended in a manner as directed by the Powerball Group in accordance with state law.

(3) Expected Prize Payout Percentages. The Grand Prize shall be determined on a pari-mutuel basis. Except as provided in this section, all other prizes awarded shall be paid as set cash prizes with the following expected prize payout percentages:
Figure: 16 TAC §401.317(d)(3)

(A) The prize money allocated to the Grand Prize category shall be divided equally by the number of game boards winning the Grand Prize.

(B) The prize pool percentage allocated to the Set Prizes (the cash prizes of $200,000 or less) shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Set Prizes awarded in the current draw. If the total of the Set Prizes awarded in a drawing exceeds the percentage of the prize pool allocated to the Set Prizes, then the amount needed to fund the Set Prizes awarded shall be drawn from the following sources, in the following order:

(i) the amount allocated to the Set Prizes and carried forward from previous draws, if any;

(ii) an amount from the Set Prizes reserve account, if available, not to exceed twenty-five million dollars ($25,000,000) per drawing.

(C) If, after these sources are depleted, there are not sufficient funds to pay the Set Prizes awarded, then the highest Set Prizes shall become a pari-mutuel prize. If the amount of the highest Set Prize, when paid on a pari-mutuel basis, drops to or below the next highest Set Prize and there are still not sufficient funds to pay the remaining Set Prizes awarded, then the next highest Set Prize shall become a pari-mutuel prize. This procedure shall continue down through all Set Prize levels, if necessary, until all Set Prize levels become pari-mutuel prize levels. In that instance, the money available from the funding sources listed in this rule shall be divided among the winning plays in proportion to their respective prize percentages.

(D) The prize money allocated to the Match 5 Bonus Prize shall be divided equally by the number of game boards winning the Match 5 Prize when a game board wins the new high jackpot amount.

(e) Probability of Winning. The following table sets forth the probability of winning and the probable distribution of winners in and among each prize category, based upon the total number of possible combinations in Powerball.
Figure: 16 TAC §401.317(e)

(f) Prize Payment.

(1) Grand Prizes. The advertised Grand Prize in a Powerball game is not a guaranteed amount; it is an estimated amount, and all advertised prizes, even advertised Set Prizes, are estimated amounts. Grand Prizes shall be paid, at the election of the player at the time of purchase, with either a per winner annuity or cash payment. If the payment election is not made at the time of purchase, then the prize shall be paid as an annuity prize. An election made by the player at the time of purchase is final and cannot be revoked, withdrawn or otherwise changed. Shares of the Grand Prize shall be determined by dividing the cash available in the Grand Prize Pool equally among all winners of the Grand Prize. Winner(s) who elect a cash payment shall be paid their share(s) in a single cash payment. The annuitized option prize shall be determined by multiplying a winner's share of the Grand Prize Pool by the annuity factor established in accordance with Texas law and the rules of the Texas Comptroller of Public Accounts. The annuity factor is determined by the best total securities price obtained through a competitive bid of qualified, pre-approved brokers made after it is determined that the prize is to be paid as an annuity prize. Neither MUSL nor any Party Lottery shall be responsible or liable for changes in the advertised or estimated annuity prize amount and the actual amount purchased after the prize payment method is actually known to MUSL. In certain instances announced by the Powerball Group, the Grand Prize shall be a guaranteed amount and shall be determined pursuant to paragraph (5) of this subsection. If individual shares of the cash held to fund an annuity is less than $250,000, the Powerball Group, in its sole discretion, may elect to pay the winners their share of the cash held in the Grand Prize Pool. All annuitized prizes shall be paid annually in thirty (30) payments with the initial payment being made in cash, to be followed by twenty-nine (29) payments funded by the annuity. All annuitized prizes shall be paid annually in thirty (30) graduated payments, as provided by the MUSL rules, (increasing each year) at a rate as determined by the Texas Lottery Commission, in accordance with Texas law. Prize payments may be rounded down to the nearest one thousand dollars ($1,000). Annual payments after the initial payment shall be made by the lottery on the anniversary date or if such date falls on a non-business day, then the first business day following the anniversary date of the selection of the jackpot winning numbers. Funds for the initial payment of an annuitized prize or the lump sum cash prize shall be made available by MUSL for payment by the Party Lottery no earlier than the fifteenth calendar day (or the next banking day if the fifteenth day is a holiday) following the drawing. If necessary, when the due date for the payment of a prize occurs before the receipt of funds in the prize pool trust sufficient to pay the prize, the transfer of funds for the payment of the full lump sum cash amount may be delayed pending receipt of funds from the party lotteries. The identification of the securities to fund the annuitized prize shall be at the sole discretion of the State of Texas.

(2) Payment of Prize Payments upon the Death of a Prize Winner. In the event of the death of a prize winner, payments will be made in accordance with §401.310 of this chapter (relating to Payment of Prize Upon Death of Prize Winner).

(3) Low-Tier Cash Prize Payments. All low-tier cash prizes (all prizes except the Grand Prize) shall be paid in cash through the Party Lottery which sold the winning ticket(s). A Party Lottery may begin paying low-tier cash prizes after receiving authorization to pay from the MUSL central office.

(4) Prizes Rounded. Annuitized payments of the Grand Prize or a share of the Grand Prize may be rounded to facilitate the purchase of an appropriate funding mechanism. Breakage on an annuitized Grand Prize win shall be added to the first cash payment to the winner or winners. Prizes other than the Grand Prize, which, under this section, may become single-payment, pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Breakage resulting from rounding these prizes shall be carried forward to the prize pool for the next drawing.

(5) Rollover. If the Grand Prize is not won in a drawing, the prize money allocated for the Grand Prize shall roll over and be added to the Grand Prize Pool for the following drawing. If a new high Grand Prize is not won in a drawing, the prize money allocated for the Match 5 Bonus Prizes shall roll over and be added to the Match 5 Bonus Prize Pool for the following drawing.

(6) Funding of Guaranteed Prizes. The Powerball Group may offer guaranteed minimum Grand Prize amounts or minimum increases in the Grand Prize amount between drawings or make other changes in the allocation of prize money where the Powerball Group finds that it would be in the best interest of the game. If a minimum Grand Prize amount or a minimum increase in the Grand Prize amount between drawings is offered by the Powerball Group, then the Grand Prize shares shall be determined as follows. If there are multiple Grand Prize winners during a single drawing, each selecting the annuitized option prize, then a winner's share of the guaranteed annuitized Grand Prize shall be determined by dividing the guaranteed annuitized Grand Prize by the number of winners. If there are multiple Grand Prize winners during a single drawing and at least one of the Grand Prize winners has elected the annuitized option prize, then the best bid submitted by MUSL's pre-approved qualified brokers shall determine the cash pool needed to fund the guaranteed annuitized Grand Prize. If no winner of the Grand Prize during a single drawing has elected the annuitized option prize, then the amount of cash in the Grand Prize Pool shall be an amount equal to the guaranteed annuitized amount divided by the average annuity factor of the most recent three best quotes provided by MUSL's pre-approved qualified brokers submitting quotes. In no case, shall quotes be used which are more than two weeks old and if less than three quotes are submitted, then MUSL shall use the average of all quotes submitted. Changes in the allocation of prize money shall be designed to retain approximately the same prize allocation percentages, over a year's time, set out in these rules. Minimum guaranteed prizes or increases may be waived if the alternate funding mechanism set out in subsection (d)(3)(B) of this section becomes necessary.

(7) Limited to Highest Prize Won. The holder of a winning ticket may win only one prize per board in connection with the winning numbers drawn, and shall be entitled only to the prize won by those numbers in the highest matching prize category.

(8) Prize Claim Period. Prize claims shall be submitted within the period set by the Party Lottery selling the ticket. If no such claim period is established, all Grand Prize claims shall be made within 180 days after the drawing date.

(9) Grand Prize Maximum Increase--Creation of Match 5 Bonus Prizes. When the Grand Prize reaches a new high annuitized amount, through a procedure as determined by the Powerball Group the maximum amount to be allocated to the Grand Prize Pool from the Grand Prize percentage shall be the previous high amount plus $25 million (annuitized) or as otherwise set by the Powerball Group. Any amount of the Grand Prize percentage which exceeds the $25 million (annuitized) increase shall be added to the Match 5 Bonus Prize Pool. The Match 5 Bonus Prize Pool is hereby created, and shall accumulate until the Grand Prize is won, at which time the Match 5 Bonus Prize Pool shall be divided equally by the number of game boards winning the Match 5 prize. If there are no Match 5 winners on the draw when the new high Grand Prize is won, then the Match 5 Bonus Prize Pool shall be divided equally by the number of game boards winning the Match 4+1 prize.

(10) Jackpot Management. After a drawing in which a Powerball jackpot is won, the MUSL Director and the MUSL Chief Finance Officer shall determine if the jackpot reached a new high annuitized amount that exceeded the previous record annuitized amount by more than $25 million annuitized. If both events occurred, then the jackpot prize won shall be the previous high annuitized amount plus $25 million, and any amount in the Powerball jackpot prize pool which exceeds that amount shall be added and paid out in Match 5 Bonus prizes.

(g) Ticket Validation. To be a valid ticket and eligible to receive a prize, a ticket shall satisfy all the requirements established by the Commission for validation of winning tickets sold through its on line system and any other validation requirements adopted by the Powerball Group and the MUSL Board. The MUSL and the Party Lotteries shall not be responsible for tickets which are altered in any manner.

(h) Ticket Responsibility.

(1) Signature. Until such time as a signature is placed upon a ticket in the area designated for signature, a ticket shall be owned by the bearer of the ticket. When a signature is placed on the ticket in the place designated, the person whose signature appears in such area shall be the owner of the ticket and shall be entitled (subject to the validation requirements in subsection (g) of this section (Ticket Validation) and state or district law) to any prize attributable thereto.

(2) Multiple Claimants. The issue of multiple claimants shall be handled in accordance with Texas Government Code Chapter 466 and §401.304 of this chapter.

(3) Stolen Tickets. The Powerball Group, the MUSL and the Party Lotteries shall not be responsible for lost or stolen tickets.

(i) Ineligible Players.

(1) A ticket or share for a MUSL game issued by the MUSL or any of its Party Lotteries shall not be purchased by, and a prize won by any such ticket or share shall not be paid to:

(A) a MUSL employee, officer, or director,

(B) a contractor or consultant under agreement with the MUSL to review the MUSL audit and security procedures,

(C) an employee of an independent accounting firm under contract with MUSL to observe drawings or site operations and actually assigned to the MUSL account and all partners, shareholders, or owners in the local office of the firm, or

(D) an immediate family member (parent, stepparent, child, stepchild, spouse, or sibling) of an individual described in subparagraphs (A), (B), and (C) of this paragraph and residing in the same household.

(2) Those persons designated by a Party Lottery's law as ineligible to play its games shall also be ineligible to play the MUSL game in that Party Lottery's jurisdiction.

(j) Applicable Law. In purchasing a ticket, the purchaser agrees to comply with and abide by all applicable laws, rules, regulations, procedures, and decisions of the Party Lottery where the ticket was purchased.

(k) Powerball Special Game Rules: Powerball Power Play.

(1) Power Play Description. The Powerball Power Play is a limited extension of the Powerball game and is conducted in accordance with the Powerball game rules and other lottery rules applicable to the Powerball game except as may be amended herein. Power Play will begin at a time announced by the Party Lottery and will continue until discontinued by the lottery. Power Play will offer to the owners of a qualifying play a chance to multiply the amount of any of the eight lump sum Set Prizes (the lump sum prizes normally paying $3 to $200,000) won in a drawing held during Power Play. The Grand Prize jackpot is not a Set Prize and will not be multiplied. Match 5 Bonus

Prizes are awarded independent of the Power Play option and are not multiplied by the Power Play Multiplier.

(2) Qualifying Play. A qualifying play is any single Powerball play for which the player pays an extra dollar for the Power Play option play and which is recorded at the Party Lottery's central computer as a qualifying play.

(3) Prizes to be Multiplied. A qualifying play which wins one of seven lowest lump sum Set Prizes (excluding the Match 5+0 prize) will be multiplied by the number selected, either two, three, four, or five (2, 3, 4, or 5), in a separate random Power Play drawing announced during the official Powerball drawing show. The announced Match 5+0 prize, for players selecting the Power Play option, shall be multiplied by five (5) unless a higher limited promotional multiplier is announced by the Powerball Group.

(4) Power Play Draws. MUSL will conduct a separate random "Power Play" drawing and announce results during each of the regular Powerball drawings held during the Power Play offering. During each Powerball drawing a single number (2, 3, 4, or 5) shall be drawn. The Powerball Group may change one or more of these multiplier numbers for special promotions from time to time.

(5) Prize Pool.

(A) Prize Pool. The prize pool for all prize categories shall consist of up to forty-nine and five tenths percent (49.5%) of each drawing period's sales, including any specific statutorily-mandated tax of a Party Lottery to be included in the price of a lottery ticket, after the Powerball prize reserve accounts are funded to the amounts set by the Powerball Group. Any amount remaining in the prize pool at the end of this game shall be carried forward to a replacement game or expended in a manner as directed by the Powerball Group in accordance with state law.

(B) Prize Reserve Accounts. An additional one-half percent (0.5%) of sales, including any specific statutorily mandated tax of a Party Lottery to be included in the price of a lottery ticket, may be collected and placed in the rollover account or in trust in one or more prize reserve accounts until the prize reserve accounts reach the amounts designated by the Powerball Group.

(C) Expected Prize Payout. Except as provided in this section, all prizes awarded shall be paid as lump sum Set Prizes. Instead of the Powerball Set Prize amounts, qualifying Power Play plays will pay the amounts shown below when matched with the Power Play number drawn:

Figure: 16 TAC §401.317(k)(5)(C)

(D) In certain rare instances, the Powerball Set Prize amount may be less than the amount shown. In such case, the Power Play prizes will be a multiple of the changed Powerball prize amount announced after the draw. For example, if the Match 5+0 Powerball Set Prize amount of $200,000 becomes $150,000 under the rules of the Powerball game, then a Power Play player winning that prize amount with a 5X multiplier would win $750,000 ($150,000 x 5).

(6) Probability of Winning. The following table sets forth the probability of the various Power Play numbers being drawn during a single Powerball drawing, except that the Power Play number for the Match 5+0 prize will be at least five (5X); setting the probability of the 5X being drawn for the Match 5+0 prize at 1 in 1. The Powerball Group may elect to run limited promotions that may increase the multiplier numbers.

Figure: 16 TAC §401.317(k)(6)

(7) Limitation of Payment of Power Play Prizes.

(A) Prize Pool Carried Forward. The prize pool percentage allocated to the Power Play Set Prizes shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Set Prizes awarded in the current draw.

(B) Pari-Mutuel Prizes--All Prize Amounts. If the total of the original Powerball Set Prizes and the multiplied Power Play Set Prizes awarded in a drawing exceeds the percentage of the prize pools allocated to the Set Prizes, then the amount needed to fund the Set Prizes (including the multiplied Set Prizes) awarded shall be drawn from the following sources, in the following order:

(i) the amount allocated to the Set Prizes and carried forward from previous draws, if any;

(ii) an amount from the Powerball Set-Prize Reserve Account, if available in the account, not to exceed twenty-five million dollars ($25,000,000) per drawing.

(C) If, after these sources are depleted, there are not sufficient funds to pay the Set Prizes awarded (including multiplied prizes), then the highest Set Prize (including the multiplied prizes) shall become a pari-mutuel prize. If the amount of the highest Set Prize, when paid on a pari-mutuel basis, drops to or below the next highest Set Prize and there are still not sufficient funds to pay the remaining Set Prizes awarded, then the next highest Set Prize, including the multiplied prize, shall become a pari-mutuel prize. This procedure shall continue down through all Set Prizes levels, if necessary, until all Set Prize levels become pari-mutuel prize levels. In that instance, the money available from the funding sources listed in this section shall be divided among the winning plays in proportion to their respective prize percentages. In rare instances, where the Powerball Set Prize amount may be funded but the money available to pay the full multiplier may not be available due to an unanticipated number of winners, the Powerball Group may announce pari-mutuel shares of the available pool for the Power Play payment only.

(8) Prize Payment.

(A) Prize Payments. All Power Play prizes shall be paid in one lump sum through the Party Lottery that sold the winning ticket(s). A Party Lottery may begin paying Power Play prizes after receiving authorization to pay from the MUSL central office.

(B) Prizes Rounded. Prizes, which, under these rules, may become pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Breakage resulting from rounding these prizes shall be carried forward to the prize pool for the next drawing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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SUBCHAPTER F. ADA REQUIREMENTS

16 TAC §401.402

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.402 (General Requirements). The purpose of the proposed amendments is to clarify the current method of determination of compliance with the Americans with Disabilities Act, including any amendments thereto, of lottery licensed facilities. Specifically, existing subsections (d) and (e) have been deleted and a newly renumbered subsection (d) has been added to the rule.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed amendments would be in effect, the public benefit anticipated from the adoption of the proposed amendments is enabling the agency to administer the lottery in a manner consistent with maximum public access and convenience.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Deanne Rienstra, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:30 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The amendments are also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.402. General Requirements.

(a) - (c) (No change.)

(d) The agency shall determine compliance with the Americans with Disabilities Act (ADA), including any amendments thereto, using certification provided by the applicant on the current license application.

~~[(d) The agency shall inspect the site of each applicant for compliance with this subchapter prior to granting a permanent license. The agency will not grant a permanent license to an applicant who is not in compliance with this subchapter. For purposes of this subsection, the provisions of §§401.401-401.408 of this title (relating to ADA Requirements) apply.]~~

~~[(e) The agency shall inspect the site of each lottery retailer for compliance with this subchapter.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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16 TAC §401.405

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.405 (Alternatives to Barrier Removal). The purpose of the proposed amendments is to remove the listed examples of proposed alternatives to barrier removal.

Specifically, the amendments remove examples such as providing curb service and/or relocating activities to accessible licensed locations.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed amendments would be in effect, the public benefit anticipated from the adoption of the proposed amendments is enabling the agency to administer the lottery in a manner consistent with maximum public access and convenience.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Deanne Rienstra, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:30 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The amendments are also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.405. Alternatives to Barrier Removal.

Where an applicant/lottery retailer can demonstrate that barrier removal in its lottery licensed facility is not readily achievable in conjunction with federal guidelines, the applicant/lottery retailer shall make lottery related goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable. [~~Examples of alternatives to barrier removal includes, but are not limited to, the following actions:~~]

~~[(1) providing curb service; and/or]~~

~~[(2) relocating activities to accessible licensed locations.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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16 TAC §401.407

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.407 (Complaints Relating to Non-accessibility). The purpose of the proposed amendments is to clarify the current practices and procedures of the agency when receiving and investigating non-accessibility complaints. Specifically: (1) new subsections (a) and (b) replace the existing subsections (a) and (b); (2) at subsections (c) and (e), the word applicant has been deleted; (3) at subsection (c), the language "identify the retailer's lottery licensed facility as being in compliance with §466.155(f) of the State Lottery Act" and "compliance is achieved" has been added; and (4) at subsection (d), the language, "deny an application for a license" has been deleted.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed amendments would be in effect, the public benefit anticipated from the adoption of the proposed amendments is enabling the agency to administer the lottery in a manner consistent with maximum public access and convenience.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Deanne Rienstra, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:30 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The amendments are also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.407. Complaints Relating to Non-accessibility.

(a) The agency will designate a specific employee or group of employees to receive and process all accessibility complaints concerning lottery retailers and/or lottery licensed facilities. Complaints must be in writing and submitted on an ADA complaint form provided by the agency. No later than 35 days after the filing of a complaint, agency personnel, who have completed ADA accessibility training developed and administered by the agency, will investigate each complaint filed with the agency. Training shall be based upon the text of the ADA, including any amendments thereto, related rules and regulations promulgated by the federal government, the State of Texas, and any technical assistance materials issued by the United States Department of Justice.

(b) No later than 35 days after the completion of the investigation, a letter of noncompliance will be issued to the lottery retailer, if the agency determines that the lottery retailer's lottery licensed facility is not in compliance with this subchapter. The noncompliance letter will identify deficiencies in the accessibility of the lottery retailer's lottery licensed facility, and will request that the readily achievable modifications be made within 63 days of the mailing date of the letter.

~~[(a) The agency will designate a specific employee or group of employees to receive and process all accessibility complaints concerning lottery retailers. Complaints must be in writing and, where possible, submitted on an agency ADA complaint form. As soon as practical, but not later than 30 days after the filing of a complaint, each complaint filed with the agency will be investigated by agency personnel who have completed ADA accessibility training developed and administered by the agency, which training shall be based upon the text of the ADA, related rules and regulations promulgated by the federal government, and any technical assistance materials issued by the United States Department of Justice. As soon as practicable but not later than 15 days after the completion of the investigation, a letter of noncompliance will be issued to the lottery retailer/applicant and the complainant that filed the original complaint, if applicable, the agency determines that the applicant/lottery retailer is not in compliance with this subchapter. Regardless of whether a complaint has been filed, the agency will issue a letter of noncompliance within 15 days after the completion of an on-site inspection of the applicant/lottery retailer's physical location if the agency determines that the applicant/lottery retailer is not in compliance with this subchapter.]~~

~~[(b) If the letter of noncompliance shows deficiencies in the accessibility of the applicant/lottery retailer's physical location, the applicant/lottery retailer shall submit a plan to the agency within 30 days of the issuance of the letter of noncompliance. The plan shall describe in detail how the applicant/lottery retailer will achieve compliance with this subchapter within 60 days of the issuance of the letter of noncompliance. The agency may grant the applicant/lottery retailer additional~~

~~time to submit the plan for good cause. Within ten days of the submission of the plan to the agency, the agency shall notify the applicant/lottery retailer of the agency's acceptance or rejection of the plan, and the reasons for such acceptance or rejection. Readily achievable modifications must be made within 60 days of the date the letter of noncompliance is mailed to the lottery retailer. If within the 60 days, the applicant/lottery retailer has not eliminated the deficiencies cited in the letter of noncompliance, but has submitted a written request for an extension of time, the agency may grant a 30-day extension for good cause. Notice of this extension will be sent to the complainant, if applicable, and the applicant/lottery retailer and any such extension will commence immediately upon expiration of the first 60-day period.~~]

(c) If the corrective action taken by the [~~applicant/~~] lottery retailer corrects the deficiencies specified in the letter of noncompliance as originally issued, or as later revised or reissued, or if the onsite inspection of the [~~applicant/~~] lottery retailer's lottery licensed facility reveals compliance with this subchapter, the agency will identify the retailer's lottery licensed facility as being in compliance with §466.155(f) of the State Lottery Act. [~~physical location reveals compliance with this subchapter, the agency will issue a notice of apparent compliance.~~] Until compliance is achieved, [~~this notice is issued,~~] a complaint will be considered pending.

(d) Failure to make readily achievable modifications within the required time period will result in the initiation of proceedings to [~~deny an application for a license or to~~] suspend or revoke the lottery license by the agency pursuant to the procedural requirements of state law.

(e) The standards and priorities contained in §401.404 of this title (relating to Priority of ADA Compliance by Lottery Licensees) will be utilized by the agency in determining the [~~applicant/~~] lottery retailer's compliance with this subchapter. A license will be suspended if the agency determines that the lottery retailer has made significant progress toward correcting deficiencies listed in the compliance report under the order of priorities contained in §401.404 of this title but has not completed readily achievable barrier removal. If the agency determines that the retailer has not made a good faith effort to correct the deficiencies listed in the compliance report, this inaction will result in the revocation of the lottery license for that lottery licensed facility.

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER B. CONDUCT OF BINGO

16 TAC §402.201

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.201 (Prohibited Bingo Occasion). The purpose of the proposed amendments is to make the rule consistent with recent legislative changes to the definition of "bingo occasion" in the Bingo Enabling Act, Texas Occupations Code §2001.002(6). The changes result from the 81st Legislature's enactment of HB 1474 effective October 1, 2009. Specifically, the proposed amendments to 16 TAC §402.201 (Prohibited Bingo Occasion) add the following language to the rule: (1) "sell bingo cards for a bingo occasion or"; (2) "sale of bingo cards and"; and (3) "sale of bingo cards, game of bingo, or bingo." Additionally, the words "and any game of bingo" have been deleted from the rule.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is language in the rule that is consistent with the Bingo Enabling Act.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 9:00 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.201. Prohibited Bingo Occasion.

No licensee shall sell bingo cards for a bingo occasion or commence or continue a bingo occasion unless an active member that has been designated pursuant to the Occupations Code, §2001.411, is physically present at the bingo premises and is actively supervising and directing the sale of bingo cards and the bingo occasion. Any sale of bingo cards, game of bingo, or bingo occasion[~~, and any game of bingo,~~] conducted in violation of this provision is a violation of the Bingo Enabling Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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16 TAC §402.203

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.203 (Unit Accounting). The purpose of the proposed amendments is to clarify the responsibilities of the unit designated agent and unit members, remove language that is duplicated in §402.205 of the chapter regarding Unit Agreements, incorporate changes to the Bingo Enabling Act resulting from recent legislation H.B. No. 1474 effective October 1, 2009, and to put the public on notice of the processes to follow and requirements related to activities involving the unit account. Specifically, the amendments include: (1) at subsection (b)(1) the word "unit" has been deleted, and the language, "from bingo, gross rental income, if applicable," has been added; (2) subsections (c), (e), and (f) have been deleted; (3) subsection (d) regarding unit representation has been added; (4) subparagraph (D) has been added to renumbered subsection (f)(1) regarding unit transactions; (5) paragraph (2) has been added to renumbered subsection (g) regarding unit recordkeeping; and (6) subsection (h) regarding unit bingo account, subsection (i) regarding transfer of funds to the unit account by new members, subsection (j) regarding distribution of funds upon withdrawal or dissolution, and subsection (k) regarding responsibilities of unit members, has been added to the rule.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is to inform interested parties of the general requirements of the unit account and to explain the processes to follow and requirements of transferring funds into the unit account by new members and distributing funds from the unit account to departing members.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 9:00 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.203. Unit Accounting.

(a) (No change.)

(b) Definitions. In addition to the definitions provided in §402.100 of this chapter, and unless the context in this section otherwise requires, the following definitions apply:

(1) Net [~~Unit's net~~] proceeds--means the unit's gross receipts from bingo and gross rental income, if applicable, less prizes awarded and authorized expenses.

(2) Default--The term used to describe the status of a licensed authorized organization that does not timely pay for the sale or lease of bingo supplies or equipment as provided in Occupations Code, §2001.218.

[~~(c) Licensed authorized organizations forming a unit, must notify the Commission in writing prior to operating as a unit.~~]

(c) [~~(d)~~] Each unit will be assigned an identification number by the Commission.

(d) Unit Representation.

(1) All units, with the exception of a unit organized under a unit agreement with a Unit Manager, must name a designated agent who is responsible for providing the Commission access to all inventory and financial records of the unit on request by the Commission.

(2) It is the responsibility of the unit members to ensure that the unit's designated agent is knowledgeable of and able to provide information to the Commission on:

(A) the unit agreement or trust agreement;

(B) submission of all required forms;

(C) unit Quarterly Report; and

(D) unit's bingo records.

(3) A unit must complete a form prescribed by the Commission to designate an authorized representative.

[~~(e) A licensed authorized organization joining or withdrawing from a unit at any time other than at the beginning or ending of a reporting quarter is responsible for filing a separate quarterly report for bingo activities conducted apart from the unit.~~]

[~~(f) Any change in the membership of a unit will require the unit to notify the Commission within 15 days.~~]

(e) [~~(g)~~] Unit's Use of Proceeds.

(1) All distributions of net proceeds of the unit shall be paid from the unit's bingo account to the account [~~or charitable use~~] designated by the unit member. Each unit member is required to maintain adequate records establishing that the [~~account or~~] use of such net proceeds is [~~used~~] in accordance with Occupations Code §2001.454.

(2) All prize fees collected in accordance with Occupation Code, §2001.502 must be deposited in the unit's bingo [~~bank~~] account and paid from the unit's bingo [~~bank~~] account.

(3) All funds disbursed to [~~paid to or on behalf of~~] a unit member shall be used in accordance with Occupations Code, §2001.454 and this chapter.

(f) [~~(h)~~] Unit Transactions.

(1) Upon prior written consent by the Commission:

(A) a licensed authorized organization may make a sale of bingo cards, pull-tab [~~instant~~] bingo tickets, or a used bingo flash board or blower to a unit;

(B) a unit may make a sale of bingo cards, pull-tab [~~instant~~] bingo tickets, or a used bingo flash board or blower to a licensed authorized organization; or

(C) a unit may make a sale of bingo cards, pull-tab [~~instant~~] bingo tickets, or a used bingo flash board or blower to another unit.

(D) Prior written consent from the Commission is required for the sale or transfer of bingo supplies as described above with the exception of bingo cards and pull tab bingo tickets transferred at the time a licensed authorized organization initially joins a unit. Within fourteen (14) calendar days of initially joining a unit, the licensed authorized organization shall notify the Commission on a form prescribed by the Commission of the inventory transferred to the unit.

(2) If a member of a unit is in default, a person may not sell or transfer bingo equipment or supplies to the unit on terms other than immediate payment on delivery, unless otherwise authorized by the Commission.

(g) [~~(i)~~] Unit Recordkeeping.

(1) Each unit must file a quarterly report, on a form prescribed by the Commission and maintain records to substantiate the contents of the report.

(2) The unit must adhere to all recordkeeping requirements in the Bingo Enabling Act and Charitable Bingo Administrative Rules.

(3) [~~(2)~~] A member of a unit which is also licensed as a commercial lessor must report its rental income on the unit quarterly report [~~continue to file the "Texas Bingo Lessor's Quarterly Report"~~] and remit the taxes on rental income.

[~~(3) Each member of a unit must file a quarterly report, on a form prescribed by the Commission, and maintain records to substantiate the contents of the report.~~]

(h) Unit Bingo Account.

(1) The unit must establish and maintain one checking account designated as the "bingo account."

(2) A unit bingo account must adhere to the same provisions of a licensed authorized organization's bingo account as required in the Bingo Enabling Act and the Charitable Bingo Administrative Rules.

(3) Except for the transfer of funds to the unit account by new members or funds transferred in accordance with §402.202 Transfer of Funds, only the following may be deposited into the bingo account:

(A) proceeds from the conduct of bingo; and

(B) rent payments received by a unit member that is also a licensed commercial lessor.

(C) A separate deposit must be made into the unit bingo account for each bingo occasion conducted. Additionally, all sales and prizes must be recorded on the records for the occasion on which they occurred.

(D) All taxes on rental income and all prize fees must be paid from the unit bingo account.

(E) The face of the checks for a unit bingo account must list the name of the unit, the words "Bingo Account", and the unit's identification number.

(i) Transfer of Funds to the Unit Account by new Members.

(1) A licensed authorized organization joining a unit may transfer funds from its previous bingo account into the unit bingo account at the time the unit is formed or at the time of joining an existing unit and within 60 days thereafter. Any additional funds transferred to the unit bingo account must comply with §402.202 Transfer of Funds. At no time, can funds that have been previously reported on a bingo quarterly report as charitable distributions be transferred to the unit account.

(2) As soon as an organization joins a unit, all of its bingo expenses must be paid from the unit bingo account including outstanding bingo expenses and subsequent expenses. The organization must make an accurate accounting of all outstanding expenses, and the total amount should be included in the funds transferred at the time the unit is formed or at the time of joining an existing unit.

(3) If a unit member does not have sufficient funds to cover outstanding bingo expenses or the amount required to join the unit, the unit member's portion of the charitable distribution may be reduced until these obligations have been satisfied. This business practice may be used provided that the exact terms are reflected in the unit agreement, a copy of the unit agreement is provided to the Charitable Bingo Operations Division, and the unit meets the charitable distribution requirement.

(4) If the organization transfers funds from its previous bingo account into the unit bingo account, the funds must be reported on the unit's "Texas Bingo Quarterly Report" for the quarter they were transferred and on the last "Texas Bingo Quarterly Report" the organization filed as a non-unit member.

(j) Distribution of Funds Upon Withdrawal or Dissolution.

(1) If, upon leaving a unit, an organization receives a distribution of funds from the unit's bingo account, the unit must classify the distribution as a charitable distribution.

(2) Funds distributed as a charitable distribution must be used for the charitable purpose of the organization in accordance with the Bingo Enabling Act and Charitable Bingo Administrative Rules and may not be used to join another unit.

(k) Responsibilities of Unit Members.

(1) Each unit member organization is responsible for administering its own bingo occasions and for any violations of the Bingo Enabling Act or Charitable Bingo Administrative Rules that may take place.

(2) Each unit member organization is responsible for maintaining and retaining the bingo records relating to all aspects of each occasion up to and including the point at which the deposit is made into the unit's bingo account.

(3) Each unit member organization is liable for any bingo cash shortages, inventory shortages, or missing or deficient occasion deposits occurring in association with the bingo occasion conducted.

(4) Each unit member organization is responsible for distributing the bingo proceeds received from the unit for its authorized charitable purposes.

(5) A unit member must expend all charitable distribution funds within the quarter it receives the distribution from the unit, unless documented in the organization's meeting minutes or in another written document. This document must include the special purpose and the date for which the distribution will be used and be signed by an officer or director. The distribution must be used for the purpose stated in the document and within the time frame indicated. The indicated use date may not exceed one year from the date the distribution was received without prior written approval from the Commission.

(6) A licensed authorized organization joining or withdrawing from a unit at any time other than at the beginning or ending of a reporting quarter is responsible for filing a separate quarterly report for bingo activities conducted apart from the unit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kimberly L. Kiplin
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16 TAC §402.212

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.212 (Promotional Bingo). The purpose of the new rule is to clarify the requirements for conducting an exempted promotional bingo game as authorized under §2001.551 of the Texas Occupations Code.

Specifically, the new rule provides definitions, restrictions, notification requirements, and recordkeeping requirements with regard to promotional bingo.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years proposed new rule will be in effect, the public benefit anticipated is to provide interested parties general requirements and processes to follow related to conducting a promotional bingo game.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 9:00 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments on the proposed new rule must be received within 30 days after publication in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.212. Promotional Bingo.

(a) Definitions.

(1) Newspaper--a printed periodical that is distributed at daily, weekly, bi-weekly or monthly intervals that contains news, articles of opinion, features, and advertising.

(2) Radio station--a licensed transmission station whose programming is broadcast over AM or FM waves or is transmitted by cable or satellite systems and can be listened to via a radio or a home computer.

(3) Television station--a licensed transmission station whose programming is broadcast over HF, VHF waves or is transmitted via a cable or satellite system and is viewable by television or a home computer.

(4) Advertising agency--a commercial operation involved with the design and sale of various advertisements and promotional concepts including promotional bingo to attract the public's attention on the behalf of another business.

(b) Restrictions.

(1) A player of a promotional bingo game cannot be required to provide personal information, money, goods, or services in order to receive playing materials or to participate in any facet of the game.

(2) A player of a promotional bingo game cannot be required to incur conditions or obligations such as requiring a purchase, providing an interview, attending a sales seminar, or posing for a photograph in order to receive playing materials or to participate in any facet of the game.

(3) A person whose identification is required to be disclosed on a Texas bingo license record may not:

(A) be involved in the conduct of a promotional bingo game;

(B) have any ownership, serve on the board of directors, or have any role in the sales, marketing, or advertising of the business conducting the promotional game;

(C) have any ownership or serve on the board of directors of the advertising agency hired by the business conducting the promotional game or serve in any role for the advertising agency related to the sales, marketing, or advertising for the business conducting the promotional game, and

(D) have any ownership or serve on the board of directors of the newspaper, radio or television station assisting the business conducting the promotional game or serve in any role for the newspaper, radio, or television station related to the sales, marketing, or adver-

tising for the business conducting the promotional game or the advertising agency.

(c) Notification.

(1) A business wishing to conduct promotional bingo must provide to the Commission 30 days prior to the start of the game:

(A) notification on a completed, prescribed form;

(B) copy of the rules for the game, and

(C) copy of the bingo card to be used or an example of the bingo card to be used and the licensed manufacturer's name, if applicable.

(2) The Commission will issue a Recognition of Exemption Notice for Promotional Bingo Games letter to the business filing the prescribed form to conduct the exempt promotional bingo game.

(d) Record Keeping. Records of the transactions connected with the game must be maintained for a period of 4 years from the conclusion of the authorized promotional bingo game.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.401

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.401 (Temporary License). The purpose of the proposed amendments is to make the rule consistent with changes to the Bingo Enabling Act resulting from recent legislation, H.B. No. 1474 effective October 1, 2009, and to remove the language that permits a licensed authorized organization to receive a refund or credit of license fees and credit of the occasion as part of the organization's total number of allowed occasions when a licensed temporary occasion is not held. Specifically, the amendments include: (1) at subsection (b)(2), "24-hour period" has been replaced with the word "day"; (2) certain language at subsection (b)(4) regarding occasion not held has been deleted; (3) new language has been added and certain language has been deleted at subsection (b)(5)(A) regarding voluntary surrender of regular license; (4) subsection (b)(5)(C) has been deleted; (5) certain language has been deleted from subsection (c); (6) subsection (d)(4) has been deleted; (7) at subsection (d)(5) language has been deleted; (8) at subsections (d)(5)(C) and (D) "annual license" has been replaced with "regular license." Subsection (e) has been modified to provide non-regular license holders clarification of the process for obtaining a temporary license.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is providing language in the rule that is consistent with the Bingo Enabling Act, and to put the public on notice that if a licensed temporary occasion is not held, the license fee and allocation of the temporary occasion as part of the organization's total number of allowed occasions will not be credited or refunded.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 9:00 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.401. Temporary License.

(a) (No change.)

(b) General.

(1) Requirements. The Commission may not issue a temporary license if the applicant has failed to file a required report, failed to pay a prize fee, penalty or interest, or has not distributed the proceeds calculated on the quarterly report for a charitable purpose.

(2) Duration. A temporary license is valid for no more than four consecutive hours during any day. [~~24-hour period.~~]

(3) Display. The licensed authorized organization must conspicuously display during a temporary bingo occasion at the licensed bingo premises a temporary license, and, if applicable, verification of notification as referred to in subsection (d)(4)(E) [~~(d)(5)(E)~~] of this section.

(4) Occasion not held. If a licensed temporary occasion is not held, the organization will forfeit any license fees paid. [~~within ten days of the scheduled occasion, an organization may submit a written request for a new playing date or for a refund or credit. The request must contain the following:~~]

[~~(A) an explanation of why the licensed temporary occasion was not held, and~~]

[(B) a specified new date for the temporary occasion or,]

[(C) a request to use, at a later date, the occasion as part of the organization's total number of allowed occasions.]

(5) Voluntary surrender of regular license.

(A) An [If a licensed] authorized organization that no longer holds a regular license to conduct bingo [has one or more temporary licenses with a stated date and time voluntarily surrenders its regular license, the licensed authorized organization] may conduct any remaining designated temporary occasions so long as the total number of occasions does not exceed six per calendar year. If over six previously specified occasions remain, the licensed authorized organization must provide to the Commission written notification of no more than six of the dates of the temporary licenses that will be utilized. This notification must be provided within ten days of surrender of the license. The [Otherwise, the] Commission will automatically revoke [cancel] all temporary licenses in excess of the six per year and the organization will forfeit any license fees paid. [occasions that were specified on the temporary licenses and will refund the fees of the unused licenses or apply them to any outstanding bingo liabilities of the organization pursuant to §402.404 of this chapter.]

(B) If the Commission denies or revokes a regular license by final and unappealable order, any temporary license held by the regular license holder that stated the specific date and time of any bingo occasion will likewise be denied or revoked [and monies refunded or applied to outstanding bingo liabilities pursuant to §402.404 of this chapter].

[(C) If the Commission denies or revokes a regular license by final and unappealable order or a license holder voluntarily surrenders a regular license, the license holder may not utilize any temporary license that does not have the date or time of a bingo occasion stated.]

(6) All records that are required to be maintained under a regular license must be maintained for a temporary bingo license.

[(c) Number and times of bingo occasions.]

[(1) If a licensed authorized organization that does not hold a regular license conducts bingo under a temporary license at a licensed bingo premises, no more than three bingo occasions may be conducted at that premises on a given day.]

(c) [(2)] The playing time of a temporary bingo occasion may not conflict with the playing time of any other license at the bingo premises on that date unless otherwise provided by law.

(d) Regular license holder.

(1) A regular license holder must apply for a temporary license at least seven calendar [working] days prior to the bingo occasion.

(2) A regular license holder may submit an application for a temporary license by fax only if the organization has [a] sufficient [temporary] license fees in its [fee amount in their temporary] license fee account with the Commission to cover the total number of temporary occasions requested.

(3) Quarterly reports filed by a regular license holder must include proceeds from all licensed temporary occasions held during the quarter.

[(4) There may be no more than three occasions per day conducted by no more than two licensed, authorized organizations.]

(4) [(5)] The Commission may issue a temporary license to a regular license holder without listing the specific date or time of a bingo occasion. The [However, the] temporary bingo occasion must be conducted at the same location [and with the same primary operator] as shown on the organization's regular license.

(A) The [Application. To receive a temporary license without a specific date or time designated, a] regular license holder must submit an application on the prescribed form that indicates the total number of temporary licenses requested for the license period along with [. In addition, the regular license holder must provide] the total amount of license fees for all temporary licenses requested.

(B) The regular license holder [Notification. An authorized organization that has a temporary license that does not state the date or time for its use] must notify the Commission of the date and time the temporary license will be used by submitting [notification on] a form prescribed by the Commission.

(C) Any [Expiration. The playing date or time for a] temporary license issued without the specific date or time identified must be used prior to the expiration date of the regular [annual] license in effect at the time the temporary license application was filed.

(D) Credit or refund. The Commission will not credit or refund a temporary license fee when an organization fails to timely notify the Commission of the playing date and time prior to the expiration of the regular [annual] license that was in effect when the temporary license was issued.

(E) The Commission shall provide a [Verification. The] verification of receipt of notification that must be posted adjacent to the applicable temporary license during the bingo occasion.

(5) [(6)] In accordance with Occupations Code, §2001.108(e), the Commission may issue to a regular license holder additional temporary licenses in excess of the number of temporary licenses specified under Occupations Code, §2001.103(e) if the following conditions are met:

(A) The regular license holder submits a completed application on the form prescribed by the Commission; and

(B) The date and times stated on the application are consistent with the day and times licensed to the organization that has ceased or will cease to conduct bingo as provided in Occupations Code, §2001.108.

(C) The Commission has not acted on an amendment application filed under Occupations Code, §2001.108(a).

(6) [(7)] If the organization is issued the amendment license filed under Occupations Code, §2001.108 prior to being issued the temporary license, the temporary license application shall be discontinued, and any license fees submitted will be credited to the organization's temporary license fee account.

(e) Non-regular license holder. A non-regular license holder that wishes to conduct a bingo occasion must file a complete application for a temporary license on a form prescribed by the Commission at least 30 working days prior to the bingo occasion.

(1) [Application. A non-regular license holder that wishes to conduct a bingo occasion must file a complete application for a temporary license on a form prescribed by the Commission at least 30 working days prior to the first bingo occasion to be played under the temporary license.] If an organization has never received a temporary license or 3 years [12 months] have elapsed since the organization last held [filed] a temporary bingo occasion, [license application with the Commission,] the organization must submit Texas Application for a

Temporary License to Conduct Charitable Bingo/Non-Regular License Holder/Section 2. [~~with their application a list of all officers, directors, operators, and workers for the organization on a form prescribed by the Commission.~~]

(2) Organizations who have held a temporary license occasion in the past three years may submit a Texas Application for a Temporary License to Conduct Charitable Bingo/Non-Regular License Holder/Section 1 to apply for a temporary license.

[~~(2) Proceeds distribution. All net proceeds reported on the quarterly report must be distributed for a charitable purpose in the quarter the funds are accrued unless the funds are distributed to a charitable purpose and reported to the Commission in the immediately subsequent quarter.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kimberly L. Kiplin
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Texas Lottery Commission
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16 TAC §402.402

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.402 (Registry of Bingo Workers). The purpose of the proposed amendments is to make the rule consistent with changes to the Bingo Enabling Act resulting from recent legislation H.B. No. 1474 effective October 1, 2009 and to provide additional useful information related to individuals required to be listed on the registry. The amendments include: adding definitions and requirements for bingo chairperson, bookkeeper, and provisional employee; deleting language that is now covered by the Act pertaining to expiration of a listing on the registry; and providing that payment for employment of a provisional employee is an authorized expense.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is to provide language in the rule that is consistent with the Bingo Enabling Act and provide useful information for individuals required to be listed on the worker registry.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 9:00 a.m. on Monday, December 14, 2009, at 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Texas Occupations Code, Chapter 2001.

§402.402. Registry of Bingo Workers.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Bingo Chairperson--an individual named in accordance with Texas Occupations Code §2001.002(4-a) and §2001.102(b)(6).

(2) Bookkeeper--an individual who prepares any financial records for information reported on the Texas Bingo Conductor's Quarterly Report or who prepares and maintains bingo inventory records for a licensed authorized organization.

(3) [~~(1)~~] Caller--an individual who operates the bingo ball selection device and announces the balls selected.

(4) [~~(2)~~] Cashier--an individual who sells and records bingo card and pull tab sales to bingo players and/or pays winners the appropriate prize.

(5) [~~(3)~~] Completed Application--A registry application or renewal form prescribed by the Commission which is legible and lists at a minimum the applicant's complete legal name, address, social security number or registry number, date of birth, race, gender and signature.

(6) [~~(4)~~] Manager--an individual who oversees the day-to-day operation of the bingo premises.

(7) [~~(5)~~] Operator--means an active bona fide member of a licensed authorized organization that has been designated on a form prescribed by the Commission prior to acting in the capacity as the organization's operator.

(8) Provisional Employee--an individual who is employed by a licensed authorized organization as an operator, manager, cashier, usher, caller, or salesperson while awaiting the results of a background check, whether paid or not.

(9) [~~(6)~~] Salesperson--an individual who monitors bingo players, sells bingo cards and pull tabs, verifies winning cards and pull-tabs and/or delivers the prize money to the winners; may be referred to as an usher, floor worker, or runner.

(10) [~~(7)~~] Usher--an individual who monitors bingo players, sells bingo cards and pull tabs, verifies winning cards and pull-tabs and/or delivers the prize money to the winners; may be referred to as a salesperson, floor worker or runner.

(b) Who must be listed on the Registry of Approved Bingo Workers. Any individual [~~person~~] who carries out or performs the

functions of a caller, cashier, manager, operator, usher, [~~or~~] salesperson, bookkeeper, or bingo chairperson as defined in subsection (a) of this section must be listed on the Registry of Approved Bingo Workers prior to being involved in the conduct of bingo.

(c) Each individual must submit a completed Texas Application for Registry of Approved Bingo Workers as prescribed by the Commission to remain on the Registry of Approved Bingo Workers.

(d) The registrant will be added to the registry as soon as possible after the Commission has determined that the individual [~~person~~] is eligible to be involved in the conduct of bingo or act as an operator.

(e) For purposes of the Registry of Approved Bingo Workers, each operator, bookkeeper, and bingo chairperson must be designated on the licensed authorized organization's license to conduct bingo application [~~pursuant to the Texas Occupations Code, §2001.102(10) as the member who will be responsible for the conduct of bingo under the terms of the license and the Bingo Enabling Act~~].

(f) A licensed authorized [~~An~~] organization must submit the name of a registered operator, bookkeeper, or bingo chairperson on a form prescribed by the Commission prior to the individual's acting in that [~~the~~] capacity [~~of an operator. An operator who fails to renew their intent to remain on the registry prior to the registry expiration may not serve as an operator in any manner, including signing applications and forms on behalf of the organization, until re-listed on the registry after filing the required forms~~].

(g) A registered worker who fails to timely submit the prescribed form to renew listing on the registry may not be involved in the conduct of bingo until the individual is again added to the registry. Payment for the employment of a provisional employee as outlined in subsection (a)(6) of this subsection is an authorized bingo expense; however payment for non-registered workers is not an authorized bingo expense. It is the responsibility of the licensed authorized organization to review the registry to confirm that the individual's registration is current.

[~~(f) Expiration of listing on registry of approved bingo workers. A registrant's listing on the registry is valid for three years from the last date of inclusion on the registry, unless the individual's listing is removed for cause prior to the expiration of three years. Every three years after the date the person's name is listed on the registry the individual shall submit a completed renewal form prescribed by the Commission stating the person's intent to remain on the registry. Failure to timely submit the prescribed form will result in the deletion of the worker's name from the registry. A person whose name is deleted from the registry due to failure to verify the intent to remain on the registry may be re-listed on the registry by filing the required form. A registered worker who fails to timely submit the prescribed form to renew listing on the registry may not be involved in the conduct of bingo until the worker is again added to the registry. Payment for serving in a position listed in subsection (b) of this section by a person not listed on the registry is not an authorized expense. It is the responsibility of the licensed authorized organization to review the registry to confirm that the worker's registration is current.~~]

(h) [~~(g)~~] How to be listed on the Registry of Approved Bingo Workers. For an individual [~~a person~~] to be listed on the Registry of Approved Bingo Workers, an individual [~~a person~~] must:

(1) submit a completed Texas Application for Registry of Approved Bingo Workers form as prescribed by the Commission;

(2) submit any [~~the~~] required fee for the cost of the card or form;

(3) submit a verifiable FBI or DPS fingerprint card if at the time of registration:

(A) the individual [~~person~~] is residing outside of Texas; or

(B) the individual [~~person~~] maintains a driver's license or registration in another state; and

(4) be determined by the Commission to not be ineligible under Texas Occupations Code, §2001.105(a)(6).

(i) [~~(h)~~] Incomplete Applications. The Commission will notify the applicant at the address provided if the registry application or renewal form submitted is not complete and will identify what is missing. The original application will be returned to the applicant for correction and resubmission. It is the responsibility of the registry applicant to resubmit a completed application before it may be processed. Failure to submit an FBI or DPS fingerprint card, if required, is grounds for denial or removal of the registration.

(j) [~~(i)~~] An individual listed on the registry must notify the Commission of any changes to information contained on the Texas Application for Registry of Approved Bingo Workers on file with the Commission within 30 days of the change in information. Such notification shall be in writing or other approved electronic means.

(k) [~~(j)~~] Identification Card for Approved Bingo Worker.

(1) The Commission will issue an identification card indicating that the individual [~~person~~] is listed in the registry. A registered worker and operator must wear his/her identification card while on duty.

(2) The identification card worn by the registered worker or operator while on duty must be visible. [~~The identification card shall list the individual's name and unique registration number, as issued by the Commission. An individual may obtain the unique registration number from the Registry of Approved Bingo Workers on the Commission's website or by requesting the number from the Commission.~~]

(3) The identification card shall list the individual's name, unique registration number and registry expiration date as issued by the Commission. An individual may obtain the unique registration number and registry expiration date from the Registry of Approved Bingo Workers on the Commission's website or by requesting the registration number and registry expiration date from the Commission.

(4) [~~(3)~~] An identification card is not transferable and may be worn only by the individual identified on the card.

(5) [~~(4)~~] Upon request by a Commission employee, an individual [~~a person~~] described in subsection (a) of this section shall present personal photo identification in order to verify the identification card is that individual's [~~person's~~] card.

(l) [~~(k)~~] How to Obtain Approved Identification Cards.

(1) A completed identification card may be obtained from the Commission by submitting the required fee and submitting the required form.

(2) The fee for an identification card or identification card form may not exceed $5.00.

(3) An individual [~~A person~~] who has been approved to work in charitable bingo may complete an identification card form provided by the Commission for use while on duty. Blank identification card forms may be obtained from the Commission. The individual [~~person~~] requesting the identification card form(s) must submit any [~~the~~] required fee and the required form for the blank identification card form.

(4) The identification card prepared by the individual may only be on a prescribed Commission card form and must be legible and include the individual's name, unique [and] registration number, and registry expiration date.

(m) [(l)] A licensed authorized organization which is reporting conduct where there is a substantial basis for believing that the conduct would constitute grounds for removal or refusal to list on the registry shall make the report in writing to: Bingo Registry, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

(n) [(m)] The provisions of the Texas Occupations Code, §2001.313 related to the registry of bingo workers do not apply to an authorized organization that does not have a regular [an annual] license to conduct bingo who receives a temporary license to conduct bingo.

(o) [(n)] If the Commission proposes to refuse to add or proposes to remove the individual [person] from the Registry of Approved Bingo Workers consistent with Texas Occupations Code, §2001.313, the Commission will give notice of the proposed action as provided by Government Code, Chapter 2001.

(p) [(o)] An individual [A person] receiving notice that the Commission intends to refuse to add to or intends to remove the individual [person] from the Registry of Approved Bingo Workers may request a hearing. Failure to submit a written request for a hearing within 30 calendar days of the date of the notice will result in the denial of the application or removal of the registered worker from the registry.

(q) [(p)] An individual [A person] who has been denied or removed from the registry [through the hearing process] because of an offense listed under Texas Occupations Code, §2001.105(b), may only reapply to be listed ten years after the termination date of a sentence, parole, mandatory supervision, or community supervision served for the offense. Applications received earlier will not be processed.

(r) A provisional employee must:

(1) indicate the playing location(s) where the individual is provisionally employed on the Texas Application for Registry of Approved Bingo Workers form submitted to the Commission.

(2) immediately stop working:

(A) after 14 days if the individual is not listed on the registry and is a resident of this state.

(B) after 45 days if the individual is not listed on the registry, not a resident of this state, and submitted a fingerprint card for a background investigation. If the fingerprint cards are returned by the law enforcement agency as unclassifiable, the Commission will notify the individual, and the individual may continue to be provisionally employed by submitting a written request and new fingerprint cards within 14 days of the notification.

(C) if found to be ineligible on the basis of the background investigation.

(3) wear an identification card while on duty with the registry applicant's name, "Provisional Employment" as the unique registration number, and the submission date of the registry application as the expiration date.

(s) A licensed authorized organization who employs a provisional employee must maintain a copy of the registry applicant's completed Texas Application for Registry of Approved Bingo Workers form submitted to the Commission until the individual is listed on the registry or the licensed authorized organization is notified that the individual is not eligible to be listed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION

The State Board for Educator Certification (SBEC) proposes the repeal of §§229.1 - 229.12 and new §§229.1 - 229.9, concerning the accountability system for educator preparation. The sections proposed for repeal address general provisions and purpose of the accountability system, definitions, the accreditation process, continuing approval of certification field, commendations for success, oversight of entity rated "accredited-under review," and reporting requirements. The proposed new sections would provide general provisions, definitions, and required data submissions, specify requirements for the new accountability system for educator preparation programs, including the assignment of an educator preparation program accreditation status, and allow the SBEC to intervene in cases of low-performance. The proposed sections would also provide for appeals of SBEC accreditation status determinations, sanctions, and orders relating to educator preparation program interventions.

The proposed repeals and new sections are necessary as a result of Senate Bill (SB) 174, 81st Texas Legislature, 2009, which requires expanded accountability requirements for SBEC-approved educator preparation programs. In addition, SB 174 requires the Texas Education Agency (TEA) to develop a website with consumer information to assist teacher candidates in selecting an educator preparation program and to assist school districts in hiring decisions. The proposed repeals and new sections also result from the SBEC's rule review conducted in accordance with Texas Government Code, §2001.039. The TEA Division of Educator Standards held stakeholder meetings on July 23, 2009, August 11, 2009, and August 17, 2009, to ensure stakeholder input.

The Texas Education Code (TEC), §21.045, states that the board shall propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs.

Current 19 TAC §§229.1 - 229.12 establishes the process used for issuing annual accreditation ratings for all educator preparation programs, based on certification test scores of completers.

Currently, the accountability system uses only certification test scores of educator preparation program completers to establish

the accountability ratings for SBEC-approved educator preparation programs. With the enactment of SB 174, there are more opportunities for the collection of data and other accountability indicators for the purpose of governing SBEC-approved educator preparation programs.

Regarding procedural and reporting implications for the proposed rule actions, the TEA staff have determined that in order to implement SB 174, all SBEC-approved educator preparation programs would follow all reporting procedures outlines in proposed new 19 TAC §§229.1 - 229.9. Educator preparation programs would report data according to the reporting dates stated in the proposed new sections. The proposed rule actions would require all SBEC-approved educator preparation programs to maintain locally all required data according to proposed new 19 TAC §§229.1 - 229.9. In addition, educator preparation programs would submit and maintain data in the state accountability system for educator preparation programs.

Dr. Karen Loonam, deputy associate commissioner for educator certification and standards, has determined that for the first five-year period the proposed repeals and new sections are in effect there will be fiscal implications for state or local government as a result of enforcing or administering the proposed rule actions.

Currently, there are approximately 177 SBEC-approved educator preparation programs. The following fiscal implications are based on costs per entity for state government (public universities and education service centers with approved educator preparation programs), local government (school districts with approved educator preparation programs), persons (private universities and private companies with approved educator preparation programs), and small businesses and/or microbusinesses (small-size educator preparation programs) for fiscal years (FYs) 2010-2014.

There are anticipated fiscal implications for educator preparation programs as a result of enforcing proposed new 19 TAC §§229.1 - 229.9. Educator preparation programs would be required to collect and submit data for determining an educator preparation program's accreditation status. The required data collection for submission to the TEA may result in a need for each educator preparation program to hire additional personnel for data entry. The total estimated personnel cost per entity would be $50,000 for 1.0 full-time equivalent (FTE) for each year of FY 2010-FY 2014.

SB 174 authorizes and requires that educator preparation programs pay fees for continuing approval/monitoring visits required in 19 TAC §228.10. The anticipated fiscal implications per entity would be at least $1,500 by FY 2014.

For the TEA to implement new educator preparation program standards related to growth in academic performance of students taught in a teacher's first three years of teaching, new data establishing a teacher-student link for assessment results would be collected. The TEA has received a federal grant to develop this link, which is scheduled to be in place in FY 2013. The TEA estimates the cost of software updates associated with the collection of data necessary to implement the standards at $650,000 in FY 2012 and $130,000 in each year for FY 2013 and FY 2014. Conducting the analysis to implement the standards would require 1.0 additional FTE at a cost of $98,844 in FY 2012 and $90,844 in each year for FY 2013 and FY 2014, inclusive of salary, benefits, and other operating expenses. It is assumed that these costs would be offset by increased fee revenue authorized by SB 174.

The provisions of SB 174 related to sanctions for educator preparation programs that fail to meet the accountability standards would require 1.0 additional attorney FTE at the TEA at a cost of $98,844 in FY 2010 and $90,844 in each year for FY 2011-FY 2014, inclusive of salary, benefits, and other operating expenses. It is assumed that this cost would be offset by increased fee revenue authorized by SB 174.

Programming costs for updates to the TEA web site to provide the information regarding individual educator preparation programs required by SB 174 are estimated at $250,000 in FY 2010 and $50,000 in each year for FY 2011-FY 2014 in maintenance costs. The TEA estimates 1.0 FTE would be necessary to compile and analyze results of exit surveys for inclusion on the web site at a cost of $76,491 in FY 2010 and $68,491 in each year for FY 2011-FY 2014, inclusive of salary, benefits, and other expenses. The TEA estimates the cost of software updates associated with the collection of data necessary to implement new educator preparation standards at $650,000 in FY 2012 and $130,000 in each year for FY 2013 and FY 2014. The TEA estimates programming costs of $50,000 in FY 2010 and $10,000 in each year for FY 2011-FY 2014 to provide for a web-based application for school principal surveys. It is assumed that these costs would be offset by increased fee revenue authorized by SB 174.

Dr. Loonam has determined that for the first five-year period the proposed repeals and new sections are in effect the public benefit anticipated as a result of the proposed repeals and new sections would be an accountability system that informs the public of the quality of educator preparation provided by each SBEC-approved educator preparation program. As stated earlier, there may be economic costs to persons or entities required to comply with the proposed repeals and new sections.

There may be an anticipated economic impact for small businesses and microbusinesses that serve as approved educator preparation entities with alternative certification programs. It is estimated that the proposed rule actions will affect between 1-100 small businesses and 1-100 microbusinesses (businesses with 20 or fewer employees). The projected economic impact may be for compliance costs such as an increase in personnel and continuing approval/monitoring visits.

No regulatory flexibility analysis will be conducted under the Texas Government Code, §2006.002. The proposed new sections are explicitly required by state mandate. There is no flexibility in implementing these new statutory requirements; therefore, no regulatory flexibility analysis can be performed.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *sbecrules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed repeals and new sections submitted under the Administrative Procedure Act must be received by the Department of Educator Quality and Standards, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Jerel Booker, associate commissioner for educator quality and standards, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

19 TAC §§229.1 - 229.12

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the

State Board for Educator Certification or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under the TEC, §21.041(c), which requires the SBEC to propose a rule adopting a fee for the issuance and maintenance of an educator certificate that, when combined with any fees imposed under subsection (d), is adequate to cover the cost of administration of the TEC, Chapter 21, Subchapter B; §21.041(d), which authorizes the SBEC to propose a rule adopting a fee for the approval or renewal of approval of an educator preparation program, or for the addition of a certificate or field of certification to the scope of a program's approval; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on the following information that is disaggregated with respect to sex and ethnicity: results of the certification examinations prescribed under the TEC, §21.048(a); performance based on the appraisal system for beginning teachers adopted by the SBEC; achievement, including improvement in achievement, of students taught by beginning teachers for the first three years following certification, to the extent practicable; and compliance with SBEC requirements regarding the frequency, duration, and quality of structural guidance and ongoing support provided by field supervisors to beginning teachers during their first year in the classroom; §21.045(b), which states that each educator preparation program shall submit specific performance data, information, and data elements as required by the SBEC for an annual performance report to ensure candidate access and equity; §21.045(c), which states that the SBEC shall propose rules establishing performance standards based on subsection (a) for the Accountability System for Educator Preparation for accrediting educator preparation programs; §21.0451, which states that the SBEC shall propose rules for the sanction of educator preparation programs that do not meet accountability standards and shall annually review the accreditation status of each educator preparation program. The costs of technical assistance required under subsection (a)(2)(A) or the costs associated with the appointment of a monitor under subsection (a)(2)(C) shall be paid by the sponsor of the educator preparation program; §21.0452, which states that to assist persons interested in obtaining teaching certification in selecting an educator preparation program and assist school districts in making staffing decisions, the SBEC shall make certain specified information regarding educator programs in this state available to the public through the SBEC's Internet website.

The proposed repeals implement the TEC, §§21.041(c) and (d), 21.045, 21.0451, and 21.0452.

§229.1. General Provisions and Purpose of Accountability System.

§229.2. Definitions.

§229.3. The Accreditation Process.

§229.4. Continuing Approval of Certification Field.

§229.5. Commendations for Success.

§229.6. Oversight of Entity Rated Accredited-Under Review.

§229.7. Reporting Requirements.

§229.8. Definitions.

§229.9. The Accreditation Process.

§229.10. Commendations for Success.

§229.11. Oversight of Entity Rated Accredited-Under Review.

§229.12. Reporting Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905453

Jerel Booker

Associate Commissioner, Educator Quality and Standards, Texas Education Agency

State Board for Educator Certification

Earliest possible date of adoption: January 3, 2010

For further information, please call: (512) 475-1497

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CHAPTER 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION PROGRAMS

19 TAC §§229.1 - 229.9

The new sections are proposed under the Texas Education Code (TEC), §21.041(c), which requires the State Board for Educator Certification (SBEC) to propose a rule adopting a fee for the issuance and maintenance of an educator certificate that, when combined with any fees imposed under subsection (d), is adequate to cover the cost of administration of the TEC, Chapter 21, Subchapter B; §21.041(d), which authorizes the SBEC to propose a rule adopting a fee for the approval or renewal of approval of an educator preparation program, or for the addition of a certificate or field of certification to the scope of a program's approval; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on the following information that is disaggregated with respect to sex and ethnicity: results of the certification examinations prescribed under the TEC, §21.048(a); performance based on the appraisal system for beginning teachers adopted by the SBEC; achievement, including improvement in achievement, of students taught by beginning teachers for the first three years following certification, to the extent practicable; and compliance with SBEC requirements regarding the frequency, duration, and quality of structural guidance and ongoing support provided by field supervisors to beginning teachers during their first year in the classroom; §21.045(b), which states that each educator preparation program shall submit specific performance data, information, and data elements as required by the SBEC for an annual performance report to ensure candidate access and equity; §21.045(c), which states that the SBEC shall propose rules establishing performance standards based on subsection (a) for the Accountability System for Educator Preparation for accrediting educator preparation programs; §21.0451, which states that the SBEC shall propose rules for the sanction of educator preparation programs that do not meet accountability standards and shall annually review the accreditation status of each educator preparation program. The costs of technical assistance required under subsection (a)(2)(A) or the costs associated with the appointment of a monitor under

subsection (a)(2)(C) shall be paid by the sponsor of the educator preparation program; §21.0452, which states that to assist persons interested in obtaining teaching certification in selecting an educator preparation program and assist school districts in making staffing decisions, the SBEC shall make certain specified information regarding educator programs in this state available to the public through the SBEC's Internet website.

The proposed new sections implement the TEC, §§21.041(c) and (d), 21.045, 21.0451, and 21.0452.

§229.1. General Provisions and Purpose of Accountability System for Educator Preparation Programs.

(a) The State Board for Educator Certification (SBEC) is responsible for establishing standards to govern the continuing accountability of all educator preparation programs (EPPs). The rules adopted by the SBEC in this chapter govern the accreditation of each EPP that prepares individuals for educator certification. No candidate shall be recommended for any Texas educator certification field except by an EPP that has been approved by the SBEC pursuant to Chapter 228 of this title (relating to Requirements for Educator Preparation Programs) and is accredited as required by this chapter.

(b) The purpose of the accountability system for educator preparation is to assure that each EPP is held accountable for the readiness for certification of candidates completing the programs.

(c) An accredited EPP may receive commendations for success in areas identified by the SBEC.

§229.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Academic year--A period of 12 consecutive months, starting September 1 and ending August 31.

(2) ACT®--The college entrance examination from ACT®.

(3) Administrator--For purposes of the surveys and information required by this chapter, an educator whose certification would entitle him or her to be assigned as a principal or assistant principal in Texas, whether or not he or she is currently working in such an assignment.

(4) Alternative certification program--An approved educator preparation program, delivered by entities described in §228.20(a) of this title (relating to Governance of Educator Preparation Programs), specifically designed as an alternative to a traditional undergraduate certification program, for individuals already holding at least a baccalaureate degree.

(5) Beginning teacher--For purposes of this chapter, an educator who is required by State Board for Educator Certification rules to receive field supervision during an internship, student teaching, or clinical teaching or a classroom teacher with less than three years experience.

(6) Campus-based mentor--A certified educator assigned by the campus administrator who has completed mentor training; who guides, assists, and supports the beginning teacher; and who reports the beginning teacher's progress to that teacher's educator preparation program.

(7) Candidate--An individual who has been admitted into an educator preparation program, including an individual who has been accepted on a contingency basis; also referred to as an enrollee or participant.

(8) Certification field--Professional development (elementary and secondary) and delivery system fields, academic or career and technical content fields, special education fields, specializations, or professional fields in which an entity is approved to offer certification.

(9) Clinical teaching--A 12-week full-day teaching practicum in an alternative certification program at a public school accredited by the Texas Education Agency or a Texas Education Agency-recognized private school that may lead to completion of a standard certificate.

(10) Completer--According to the Higher Education Act, "A person who has met all the requirements of a state-approved educator preparation program." The term completer is no longer used to define the class of educator preparation program candidates subject to a determination of certification examination pass rate.

(11) Cooperating teacher--The campus-based mentor teacher for the student teacher or clinical teacher.

(12) Demographic group--Male and female, as to gender; the aggregate reporting categories established by the Higher Education Act, as to race and ethnicity. Each educator preparation program will assign a candidate to one gender demographic group and at least one Higher Education Act-established race or ethnicity group.

(13) Educator preparation program provider--An entity approved by the State Board for Educator Certification to recommend candidates in one or more educator certification fields.

(14) Educator preparation program data--Data elements reported to meet requirements under the Texas Education Code, §21.045(b).

(15) Examination--An examination or other test required by statute or State Board for Educator Certification rule that governs an individual's admission to an educator preparation program, certification as an educator, continuation as an educator, or advancement as an educator.

(16) Field supervisor--A certified educator, preferably with advanced credentials, who is hired by the educator preparation program to observe candidates, monitor their performances, and provide constructive feedback to improve their effectiveness as an educator. A campus mentor or cooperating teacher, assigned as required by §228.35(e) of this title (relating to Preparation Program Coursework and/or Training), may not also serve as a field supervisor.

(17) First year in the classroom--For purposes of the Texas Education Code, §21.045(a)(4), and its implementation in this chapter, the period during which field supervision of a beginning teacher is required.

(18) GPA--Grade point average.

(19) GRE®--Graduate Record Examinations®.

(20) Higher Education Act--Federal legislation consisting of the Higher Education Act of 1965 (20 United States Code, §1070 et seq.) and its subsequent amendments, which requires reports of educator preparation program performance data.

(21) Highly qualified teacher--A teacher who has a baccalaureate degree and full state certification and has demonstrated competency in all subjects in which he or she teaches. A highly qualified teacher has not had any certification requirements waived on an emergency certificate or permit.

(22) Highly qualified teacher in an alternative certification program--A teacher who is participating in an alternative certification program may be considered to meet the certification requirements of

the definition of a highly qualified teacher (and not be counted on a waiver) if he or she is issued a probationary certificate whereby he or she is permitted to assume functions as a regular classroom teacher for a specified period of time not to exceed three years and he or she demonstrates satisfactory progress toward full certification. The teacher's alternative certification program must provide high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction before and while teaching. The teacher must receive intensive supervision that consists of structured guidance and regular ongoing support, as required by §228.35 of this title (relating to Preparation Program Coursework and/or Training).

(23) IHE--Institution of Higher Education.

(24) Institutional report--Educator preparation program data reported to the United States Department of Education and the Texas Education Agency as required under the Higher Education Act.

(25) Internship--A one-year supervised professional assignment at a public school accredited by the Texas Education Agency or a Texas Education Agency-recognized private school that may lead to completion of a standard certificate.

(26) Pass rate--For each academic year, the percent of tests passed by candidates who have finished all educator preparation program requirements for coursework; training; and internship, student teaching, clinical teaching, or practicum by the end of that academic year. For purposes of determining the pass rate, candidates shall not be excluded because the candidate has not been recommended for certification, has not passed a certification examination, or is not considered a "completer" for purposes of the Higher Education Act or other applicable law. The pass rate is based solely on the examinations required to obtain certification in the field(s) for which the candidate serves his or her internship, student teaching, clinical teaching, or practicum. Examinations not required for certification in that field or fields, whether taken before or after admission to an educator preparation program, are not included. The rate reflects a candidate's success only on the last attempt made on the examination by the end of the academic year in which the candidate finishes the coursework; training; and internship, student teaching, clinical teaching, or practicum program requirements, and does not reflect any attempts made after that year. The formula for calculation of pass rate is the number of successful (i.e., passing) last attempts made by candidates who have finished the specified educator preparation program requirements divided by the total number of last attempts made by those candidates.

(27) Practicum--Practical work in a particular field; refers to student teaching, clinical teaching, internship, or practicum for a professional certificate that is in the school setting.

(28) SAT®--The college entrance examination from the College Board.

(29) Scaled score--A conversion of a candidate's raw score on an examination or a version of the examination to a common scale that allows for a numerical comparison between candidates.

(30) Student teaching--A 12-week full-day teaching practicum in a program provided by an accredited university at a public school accredited by the Texas Education Agency or a Texas Education Agency-recognized private school that may lead to completion of a standard certificate.

(31) Texas Education Agency staff--Staff of the Texas Education Agency assigned by the commissioner of education to perform the SBEC's administrative functions and services.

(32) Willfully or recklessly--With conscious disregard for the requirements of complete and accurate reporting imposed by this chapter.

§229.3. Required Submissions of Information, Surveys, and Other Data.

(a) Educator preparation programs (EPPs), educator preparation candidates, beginning teachers, field supervisors, school principals and administrators, campus mentors, and cooperating teachers shall provide to the Texas Education Agency (TEA) staff all data and information required by this chapter, as set forth in subsection (e) of this section and the Texas Education Code (TEC), §21.045 and §21.0452.

(b) Any individual holding a Texas-issued educator certificate who willfully or recklessly fails to provide information required by this chapter and the TEC, §21.045 and §21.0452, as set forth in subsection (e) of this section, shall be subject to sanction of his or her certificate, including the placement of restrictions, inscribed or non-inscribed reprimand, suspension, or revocation.

(c) Any Texas public school that willfully or recklessly fails to provide information required by this chapter and the TEC, §21.045 and §21.0452, as set forth in subsection (e) of this section, shall be subject to sanctions upon its accreditation status.

(d) Any open-enrollment charter school that willfully or recklessly fails to provide information required by this chapter and the TEC, §21.045 and §21.0452, as set forth in subsection (e) of this section, may be considered to have committed a material violation of the school's charter pursuant to the TEC, Chapter 12.

(e) All required EPP data for an academic year shall be submitted to the TEA staff annually on September 15 following the end of that academic year. All surveys and information required to be submitted pursuant to this chapter by school administrators and principals shall be submitted by June 15 of any academic year in which the school administrator and principal have had experience with a candidate or beginning teacher who was a participant in an EPP. All surveys and information required to be submitted pursuant to this chapter by EPP candidates shall be submitted by August 1 of each academic year in which it is required.

(f) The following apply to data submissions required by this chapter.

(1) EPPs shall provide data for all candidates as specified in the figure provided in this paragraph.
Figure: 19 TAC §229.3(f)(1)

(2) Participants in an EPP shall complete a survey, in a form approved by the State Board for Educator Certification (SBEC), evaluating the preparation he or she received in the EPP. Completion and submission to the SBEC of the survey is a requirement for issuance of a standard certificate.

(3) Principals or designated administrators in Texas public schools and open-enrollment charter schools shall complete individual teacher performance surveys, in a form to be approved by the SBEC, for each beginning teacher under the supervision of an EPP.

(4) Principals or designated administrators in Texas public schools and open-enrollment charter schools shall complete surveys, in a form to be approved by the SBEC, evaluating the effectiveness of preparation for classroom success for each EPP with which the principals or designated administrators have had experience in the previous year.

§229.4. Determination of Accreditation Status.

(a) The accreditation status of an educator preparation program (EPP) shall be determined at least annually, based on perfor-

mance standards established in rule by the State Board for Educator Certification (SBEC), with regard to the following EPP accountability performance indicators, disaggregated with respect to gender and ethnicity (according to the aggregate reporting categories for ethnicity established by the Higher Education Act), and other requirements of this chapter:

(1) the pass rate performance standard of certification examinations of EPP candidates shall be:

(A) 70% for the 2009-2010 academic year;

(B) 75% for the 2010-2011 academic year; and

(C) 80% for the 2011-2012 academic year;

(2) the results of appraisals of beginning teachers by school administrators, based on an appraisal document and standards that must be independently developed by the Texas Education Agency (TEA) staff and approved by the SBEC;

(3) to the extent practicable, as valid data becomes available and performance standards are developed, the improvement in student achievement of students taught by beginning teachers for the first three years following certification; and

(4) the results of data collections establishing EPP compliance with SBEC requirements regarding the frequency, duration, and quality of field supervision of beginning teachers during their first year in the classroom.

(A) The 2009-2010 academic year will be a pilot year for these data collections.

(B) For the 2010-2011 academic year, the performance standard will be a 90% compliance rate with SBEC requirements as to the frequency, duration, and required documentation of field supervision for each EPP candidate.

(C) For the 2011-2012 academic year, the performance standard will be a 95% compliance rate with SBEC requirements as to the frequency, duration, and required documentation of field supervision for each EPP candidate.

(b) An EPP shall be assigned an Accredited status if the EPP has met the accountability performance standards described in subsection (a) of this section and has been approved by the SBEC to prepare, train, and recommend candidates for certification.

(c) An EPP shall be assigned Accredited-Not Rated status upon initial approval to offer educator preparation, until the EPP can be assigned a status based on the performance standards described in subsection (a) of this section. An EPP is fully accredited and may recommend candidates for certification while it is in Accredited-Not Rated status.

(d) Accredited-Warned status. An EPP shall be assigned Accredited-Warned status if the EPP:

(1) fails to meet the performance standards set by the SBEC for the overall performance of all its candidates on any of the four performance indicators set forth in subsection (a) of this section in any one year;

(2) fails to meet the standards in any two gender or ethnicity demographic groups on any of the four performance indicators set forth in subsection (a) of this section in any one year; or

(3) fails to meet the standards for a gender or ethnicity demographic group on any of the four performance indicators set forth in subsection (a) of this section for two consecutive years, regardless of whether the deficiency is in the same demographic group or standard.

(e) Accredited-Probation status. An EPP shall be assigned Accredited-Probation status if the EPP:

(1) fails to meet the performance standards set by the SBEC for the overall performance of all its candidates on any of the four performance indicators set forth in subsection (a) of this section for two consecutive years;

(2) fails to meet the standards in any three gender or ethnicity demographic groups on any of the four performance indicators set forth in subsection (a) of this section in any one year; or

(3) fails to meet the standards for a gender or ethnicity demographic group on any of the four performance indicators set forth in subsection (a) of this section for three consecutive years, regardless of whether the deficiency is in the same demographic group or standard.

(f) Not Accredited-Revoked status.

(1) An EPP shall be assigned Not Accredited-Revoked status and its approval to recommend candidates for educator certification revoked if it is assigned Accredited-Probation status for three consecutive years.

(2) An EPP may be assigned Not Accredited-Revoked status if the EPP is assigned Accredited-Probation status for two consecutive years, and the SBEC determines that revoking the EPP's approval is reasonably necessary to achieve the purposes of the TEC, §21.045 and §21.0451.

(3) An assignment of Not Accredited-Revoked status and revocation of EPP approval to recommend candidates for educator certification is subject to the requirements of notice, record review, and appeal as described in this chapter.

(4) A revocation of an EPP approval shall be effective for a period of two years, after which a program may reapply for approval as a new EPP pursuant to Chapter 228 of this title (relating to Requirements for Educator Preparation Programs).

(5) Upon revocation of EPP approval, the EPP may not admit new candidates for educator certification, but may complete the training of candidates already admitted by the EPP and recommend them for certification. If necessary, TEA staff and other EPPs shall cooperate to assist the previously admitted candidates of the revoked EPP to complete their training.

(g) Small group exception.

(1) If any EPP candidate group subject to the performance standards described in this chapter, including groups disaggregated by gender, ethnicity, and certification field, fails to meet the required academic year aggregate standard for any applicable class of performance indicators, and the group contains ten or fewer individuals, the failure to meet the performance standard shall not be counted for purposes of accreditation status determination for that academic year.

(2) The next year's performance indicators of a group not counted the previous year shall be combined with the group's preceding year performance indicators, and if the cumulated performance indicators fail to meet the required aggregate standard for any applicable class of performance indicators, the group shall be counted as failing to meet performance standards for that academic year, as long as the cumulative number of individual performance indicators exceeds ten.

(3) If the two-year cumulated performance indicators fail to meet performance standards but still do not exceed ten individual performance indicators, the group shall not be counted again that year. The two-year cumulated performance indicators shall then be combined with the following year performance indicators of the group. The three-year cumulated performance indicators of the group must be mea-

sured against the standards in that third year, regardless of how small the cumulated number of individual performance indicators may be.

(4) The performance indicators of a group shall be measured against performance standards described in this chapter in any one year in which the number of individual performance indicators or cumulated number of individual performance indicators as provided herein exceeds ten.

(5) After a year in which a group has been counted as failing to meet a performance standard, the individual performance indicators of the group related to that standard shall be counted in each subsequent consecutive year thereafter in which the performance indicators of the group fail to meet the standard, regardless of how small the number of individual performance indicators in the group may continue to be.

(6) An EPP shall develop and file with TEA an action plan as required in subsection (h) of this section after one of its candidate groups fails to meet a performance standard regardless of whether the group contains less than ten performance indicators and is not counted for accreditation status purposes as failing to meet a performance standard.

(h) An EPP that fails to meet a required performance standard shall develop an action plan addressing the deficiencies and describing the steps the program will take to improve the performance of its candidates, especially regarding the performance standard that was not met. TEA staff may prescribe the information that must be included in the action plan. The action plan must be sent to TEA staff no later than 45 calendar days following notification to the EPP of the failure to meet a performance standard.

§229.5. Accreditation Sanctions and Procedures.

(a) If an educator preparation program (EPP) has been assigned Accredited-Warned or Accredited-Probation status, or if the State Board for Educator Certification (SBEC) determines that additional action is a necessary condition for the continuing approval of an EPP to recommend candidates for educator certification, the SBEC may take any one or more of the following actions, which shall be reviewed by the SBEC at least annually:

(1) require the EPP to obtain technical assistance approved by the Texas Education Agency (TEA) or SBEC;

(2) require the EPP to obtain professional services approved by the TEA or SBEC; and/or

(3) appoint a monitor to participate in the activities of the EPP and report the activities to the TEA or SBEC.

(b) Notwithstanding the accreditation status of an EPP, if the performance of all candidates admitted to an individual certification field offered by an EPP fail to meet any of the standards in §229.4(a) of this title (relating to Determination of Accreditation Status) for three consecutive years, the approval to offer that certification field shall be revoked. Any candidates already admitted for preparation in that field may continue in the EPP and be recommended for certification after program completion, but no new candidates shall be admitted for preparation in that field unless and until the SBEC reinstates approval for the EPP to offer that certification field.

(c) Performance indicators by gender and ethnic groups shall not be counted for purposes of subsection (b) of this section, relating to performance standards for individual certification fields. If the number of counted performance indicators for a certification field is ten or fewer, and the performance indicators fail to meet any of the standards in §229.4(a) of this title, those performance indicators shall not count that year, but shall be cumulated and counted in the same manner as provided in §229.4(c) and (d) of this title.

(d) An EPP shall be notified in writing regarding any action taken pursuant to this section, or the assignment of an accreditation status of Accredited-Warned, Accredited-Probation, or Not Accredited-Revoked. The notice shall state the basis on which the action is taken or the assignment of the accreditation status is made.

(e) All costs associated with providing or requiring technical assistance, professional services, or the appointment of a monitor pursuant to this section shall be paid by the EPP to which the services are provided or required, or its sponsor.

§229.6. Continuing Approval.

(a) The continuing approval of an educator preparation program (EPP) to recommend candidates for educator certification, which shall be reviewed pursuant to §228.10(c) of this title (relating to Approval Process), will be based upon the EPP's accreditation status and compliance with the State Board for Educator Certification (SBEC) rules regarding program admissions, operations, coursework, training, recommendation for certification, and the integrity of required data submissions.

(b) After a continuing approval review pursuant to §228.10(c) of this title, if the Texas Education Agency (TEA) staff finds that an EPP has willfully or recklessly failed to comply with SBEC rules relating to the qualifications of candidates recommended for certification or to the integrity of reported program data, the TEA staff may issue a proposal for SBEC action relating to the EPP's approval to recommend candidates for educator certification. The proposal for SBEC action may include, but is not limited to, public reprimand, revocation of program approval, or the imposition of conditions upon continuing program approval.

(c) TEA staff shall provide notice of the proposal for SBEC action relating to the EPP's continuing approval to recommend candidates for educator certification in the manner provided by §229.7 of this title (relating to Record Review of Certain Decisions), and an EPP shall be entitled to a record review of the proposal, under the conditions and procedures set out in §229.7 of this title, prior to the submission of the proposal for action to the SBEC.

(d) Following the record review, a proposal for decision will be issued by the TEA representative and submitted to the SBEC for entry of a final order. The final order may include changes or additions to the proposed order and such modifications are not subject to another record review procedure. This order may be appealed only if the final order issued by the SBEC orders revocation of approval of an EPP to recommend candidates for educator certification, as provided by §229.8 of this title (relating to Accreditation Revocation Appeals).

§229.7. Record Review of Certain Decisions.

(a) Applicability. This section applies only to a notice required under §229.5(d) of this title (relating to Accreditation Sanctions and Procedures) or under §229.6(c) of this title (relating to Continuing Approval) proposing to:

(1) require an educator preparation program (EPP) or a particular field of certification offered by an EPP to obtain technical assistance as provided by the Texas Education Code (TEC), §21.0451(a)(2)(A);

(2) require an EPP or a particular field of certification offered by an EPP to obtain professional services as provided by the TEC, §21.0451(a)(2)(B);

(3) appoint a monitor for an EPP or a particular field of certification offered by an EPP as provided by the TEC, §21.0451(a)(2)(C);

(4) assign an accreditation status of Accredited-Warned, Accredited-Probation, or Not Accredited-Revoked, as specified in §229.4 of this title (relating to Determination of Accreditation Status);

(5) issue a public reprimand or impose conditions on the continuing approval of an EPP to recommend candidates for certification pursuant to §229.5(d) of this title;

(6) revoke the approval of an EPP to recommend candidates for certification in a particular field of certification; or

(7) revoke the approval of an EPP to recommend candidates for certification.

(b) Notice. Notice of a proposed order or change in accreditation status, subject to this section, shall be made as provided by §229.5(d) and §229.6(c) of this title, and this section.

(1) The notice shall attach or make reference to all information on which the proposed order is based.

(A) Information maintained on the Texas Education Agency (TEA) and State Board for Educator Certification (SBEC) websites may be referenced by providing a general citation to the information.

(B) The TEA and SBEC reports previously sent to the EPP may be referenced by providing the title and date of the report.

(C) On request, the TEA shall provide copies of, or reasonable access to, information referenced in the notice.

(2) The notice shall state the procedures for requesting a record review of the proposed order or change in accreditation status under this section, including the name and department of the TEA representative to whom a request for record review may be addressed.

(3) The notice shall set a deadline for requesting a record review, which shall not be less than ten calendar days from the date of receipt of the notice. The notice may be delivered by mail, personal delivery, facsimile, or email.

(c) Request. The chief operating officer of the EPP may request, in writing, a record review under this section.

(1) The request must be properly addressed to the TEA representative identified in the notice under subsection (b)(2) of this section and must be received by the TEA representative on or before the deadline specified in subsection (b)(3) of this section.

(2) A timely and sufficient request for record review is a prerequisite for any appeal of the proposed order under §229.8 of this title (relating to Accreditation Revocation Appeals).

(d) Preliminary matters.

(1) In response to a request under subsection (c) of this section, the TEA representative shall provide written notice to the EPP of the date, time, and place for the record review.

(A) In the written notice, the TEA representative may:

(i) set time limits for presentations on the record review;

(ii) set deadlines for exchanging documents prior to the record review;

(iii) set deadlines for identifying participants who may present information or ask questions during the record review; and

(iv) provide any other instructions on the conduct of the record review.

(B) The TEA representative may consider reasonable requests to reschedule the record review and associated deadlines, but shall give primary importance to the need for a timely resolution of the matter under record review.

(C) The record review shall be completed on or before the expiration of 30 calendar days following receipt of the request under subsection (c) of this section.

(D) Timely completion of the record review under subsection (c) of this section is a prerequisite for an appeal of the proposed order under §229.8 of this title.

(2) The EPP shall submit any written information to the TEA representative in advance of the record review. To be considered part of the record, such information must also be presented during the record review.

(3) In its request for record review, or within a reasonable time thereafter, the EPP may request that specific TEA staff attend the record review to assist the TEA representative in reviewing the information presented.

(A) Such request shall be limited to TEA staff directly involved in the development of the information identified in the notice under subsection (b) of this section.

(B) If reasonable and practicable, the TEA representative shall schedule the record review so as to allow the requested TEA staff to attend.

(4) At all times prior to the record review, the EPP is encouraged to contact the office of the TEA representative to discuss the process and to facilitate preliminary matters. However, such communications will not be recorded and will not be considered part of the record.

(5) The EPP identification number of the affected entity must be included in all written correspondence on the record review, as well as the date the notice was issued under subsection (b) of this section. Correspondence relating to the record review may be made part of the record.

(6) All deadlines under this section shall be calculated from the date of actual receipt. No mailbox rule applies.

(e) Record review.

(1) The TEA representative shall meet with the chief operating officer and/or representatives of the EPP at the TEA headquarters in Austin, Texas, to receive oral and written information.

(2) The proceedings shall be recorded by audiotape or similar means. The audiotape and all written information presented during the record review shall comprise the official record of the proceedings.

(3) The EPP may have legal counsel present during the proceedings.

(4) The EPP may present information verbally and in writing and may rebut information presented by the TEA staff.

(5) The rules of evidence do not apply. Presentations need not follow question-and-answer format.

(6) The EPP may ask questions of the TEA staff. The TEA representative may designate a specific portion of the meeting for this purpose.

(7) The TEA representative may ask questions of any participant directly or through the TEA staff.

(8) The TEA representative shall strictly confine presentations and questions to the matters set forth in the notice and shall exclude information that is irrelevant, immaterial, or unduly repetitious.

(9) On request, the TEA representative shall include in the record a brief written proffer describing any information excluded under paragraph (8) of this subsection. In lieu of a written proffer, an oral statement may be recorded on a separate audiotape. If the excluded information is in writing, the document shall be identified as excluded and preserved with the record.

(10) The TEA representative may take official notice of generally recognized information within the TEA staff's area of specialized knowledge.

(A) Each party shall be notified, either before or during the record review, of the material officially noticed, including TEA staff memoranda or information.

(B) Any participant may present information to rebut information that is officially noticed.

(11) The special skills and knowledge of the TEA representative and staff shall be used in evaluating all information presented during the record review.

(12) At the request of the EPP, a record review may be conducted by telephone or similar means.

(13) A participant may present information via telephone or similar means during any record review.

(f) Final order. Following the record review, a proposal for decision will be issued by the TEA representative and submitted to the SBEC for entry of a final order. The final order may include changes or additions to the proposed order and such modifications are not subject to another record review procedure. This order may be appealed only as provided by §229.8 of this title.

(g) No request. If no record review is requested by the deadline specified in subsection (b)(3) of this section, a final order may be issued without record review. An order issued without record review may not be appealed under §229.8 of this title, or otherwise.

(1) The approval of an EPP to provide educator preparation is automatically:

(A) revoked, void, and of no further force or effect on the effective date of a final decision by the SBEC ordering the EPP closed under this subsection; and

(B) modified to remove authorization for an individual certification field on the effective date of a final decision by the SBEC ordering the EPP closed under this subsection.

(2) If sanctions other than revocation of approval and EPP closure are imposed on an EPP under the procedures provided by this subsection, an EPP is not entitled to any additional hearing or appeal.

(h) Other law. Texas Government Code, Chapter 2001, and the TEC, §7.057, do not apply to a record review under this section.

§229.8. Accreditation Revocation Appeals.

(a) Applicability. This section applies only to a final order issued under §229.5 of this title (relating to Accreditation Sanctions and Procedures) or §229.6 of this title (relating to Continuing Approval) that orders revocation of approval and closure of an educator preparation program (EPP) and does not apply to a final decision or order assigning Accredited-Warned or Accredited-Probation status or ordering any other sanction, including, without limitation, withdrawing approval to offer a specific certification field, public reprimand, imposing conditions upon continuing approval, requiring technical assistance, requiring professional services, or appointing a monitor.

(b) Applicability of other law. An appeal under this section shall be governed by the contested case procedures provided by Chapter 157, Subchapter EE, of this title (relating to Review by State Office of Administrative Hearings: Certain Accreditation Sanctions) and Texas Government Code, Chapter 2001. To the extent that a provision of this section conflicts with a rule or practice of the State Office of Administrative Hearings (SOAH), this section shall prevail.

(c) Petition for review. An EPP subject to a decision (final order), made applicable to this section by subsection (a) of this section, may file with the State Board for Educator Certification (SBEC) a petition for review of that decision not later than 30 calendar days after the date the decision to be reviewed is received by the EPP. The decision may be delivered by mail, personal delivery, facsimile, or email.

(1) The petition for review shall include a copy of the challenged decision and any attachments or exhibits and incorporated documents.

(2) The petition for review shall concisely state, in numbered paragraphs:

(A) if alleging the decision was made in violation of a statutory provision, the statutory provision violated and the specific facts supporting a conclusion that the statute was violated by the decision;

(B) if alleging the decision was made in excess of the SBEC's statutory authority, the SBEC's statutory authority and the specific facts supporting a conclusion that the decision was made in excess of this authority;

(C) if alleging the decision was made through unlawful procedure, the lawful procedure and the specific facts supporting a conclusion that the decision was made through unlawful procedure;

(D) if alleging the decision was affected by other error of law, the law violated and the specific facts supporting a conclusion that the decision violated that law;

(E) if alleging the decision was not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, each finding, inference, conclusion, or decision that was unsupported by substantial evidence in the record;

(F) if alleging the decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, each finding, inference, conclusion, or decision affected and the specific facts supporting a conclusion that each was so affected; and

(G) for each violation, error, or defect alleged under subparagraphs (A) - (F) of this paragraph, the substantial rights of the EPP that were prejudiced by such violation, error, or defect.

(3) A petition for review shall further contain:

(A) a concise statement of the relief sought by the EPP (petitioner); and

(B) the name, mailing address, telephone number, and facsimile number of the petitioner's representative.

(4) A request for relief in a review under this section may not be made orally or as part of the record at a record review, prehearing conference, or hearing.

(5) Failure to comply with the requirements of this subsection shall result in dismissal of the petition for review. A petition for review may not be amended or supplemented after the deadline for filing a petition for review.

(6) The SBEC shall transmit the petition for review to the SOAH with a request that it be docketed.

(7) If the SBEC chooses to file an answer, the answer must be filed by the date the record is filed under subsection (l) of this section.

(d) Standard of review. A challenge under this section shall be governed by the substantial evidence rule as provided by the Texas Government Code, §2001.174 and §2001.175, and judicial case precedents construing those provisions.

(e) Matters within SBEC's discretion. The SOAH may not substitute the SOAH judgment for the judgment of the SBEC on questions committed to the SBEC's discretion. Questions committed to the SBEC's discretion include, but are not limited to, the following:

(1) any questions arising under a statute, rule, or other legal standard that requires or permits the SBEC to make a decision within general legal guidelines that do not mandate a specific result under the circumstances; and

(2) the execution of any act authorized or required to be taken by the SBEC.

(f) Weight of evidence. The SOAH may not substitute the SOAH judgment for the judgment of the SBEC on the weight to be assigned the evidence before the SBEC.

(g) SOAH decisions. The SOAH may affirm the SBEC decision in whole or in part. The SOAH shall reverse and remand the decision for further proceedings if substantial rights of the EPP have been prejudiced because the administrative findings, inferences, conclusions, or decisions of the SBEC are:

(1) in violation of a statutory provision;

(2) in excess of the SBEC's authority;

(3) made through unlawful procedure;

(4) affected by other error of law;

(5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Remand. An order of remand may not direct or control the SBEC's exercise of discretion on a matter committed to the SBEC's discretion by the Texas Education Code (TEC), Chapter 21, Subchapter B, and the SBEC shall continue to exercise that discretion after remand. On remand, the SBEC shall apply the facts and law as determined by the SOAH to reach a new decision in light of all the circumstances of the case.

(i) Scope of review. The administrative law judge (ALJ) is confined to the SBEC record, except that the ALJ may receive evidence of procedural irregularities alleged to have occurred before the SBEC that are not reflected in the record.

(j) Additional evidence. A party may apply to the ALJ to present additional evidence of procedural irregularities alleged to have occurred before the SBEC that are not reflected in the record. If the additional evidence is material to the outcome of the review, and if there were good reasons for the failure to present it in the proceeding before the SBEC, the ALJ may order that the additional evidence be taken before the SBEC or its TEA representative on conditions determined by the ALJ. The SBEC shall file the additional evidence and any changes, new findings, or decisions with the ALJ. The ALJ may not take testimony, question witnesses, administer oaths, rule on questions of evidence, or compel discovery or disclosure of evidence in any form.

(k) Components of SBEC record. The SBEC record of proceedings shall include the following components, as specified under §229.7 of this title (relating to Record Review of Certain Decisions):

(1) the notice of proposed order, including all information referenced in the notice;

(2) the request for record review, including any request for the attendance of specific TEA staff under §229.7(d)(3) of this title;

(3) any written correspondence made a part of the record by the TEA representative under §229.7(d)(5) of this title;

(4) any audiotapes or similar recordings made a part of the record by the TEA representative under §229.7(d) of this title;

(5) all audiotapes or similar recordings of the record review and any recorded telephone conferences, proffers of excluded information, or other recorded proceedings before the TEA representative under §229.7 of this title;

(6) all written information presented to the TEA representative during the record review;

(7) a description of all matters officially noticed; and

(8) the final order issued under §229.7(f) of this title.

(l) Proceedings regarding SBEC record. The SBEC shall file the original or a certified copy of the entire record of the proceeding under review not later than 20 calendar days after the date the petition for review is filed, unless additional time is allowed by the ALJ. The record may be shortened by stipulation of all parties to the review proceedings. The ALJ may assess costs against a party who unreasonably refuses to stipulate to limit the record, unless that party is required to pay all costs of record preparation. The petitioner shall offer, and the ALJ shall admit, the TEA record into evidence as an exhibit. The ALJ may require or permit later corrections or additions to the record.

(m) Enforcement of decision pending review. The pendency of a review under this section does not stay or otherwise affect the enforcement of the SBEC decision challenged under this chapter.

(n) Expedited review. The SOAH shall expedite its review of a challenge under this section. The ALJ shall issue a pre-hearing order initially setting a date for closure of the record that is not later than 30 calendar days after the date the petition for review is filed. The ALJ may grant a continuance of the record closure date only for good cause shown. The ALJ may not order a settlement conference, mediation, or other form of alternative dispute resolution. The ALJ shall issue a final order not later than 30 calendar days after the date on which the record is finally closed.

(o) Final decision. The decision of the ALJ is final and may not be appealed. The decision of the ALJ:

(1) must rule on any mandatory sanction required by the TEC, §21.0451;

(2) may not order a sanction or relief that the SBEC is not authorized to order under applicable law; and

(3) may not change an accreditation status.

§229.9. Fees for Educator Preparation Program Approval and Accountability.

An educator preparation program requesting approval and continuation of accreditation status shall pay the applicable fee from the following list.

(1) New educator preparation program application (nonrefundable; includes pre-approval visit)--$1,000.

(2) New educator preparation program approval (includes post-approval visit)--$1,000.

(3) Ten-year reapplication for an educator preparation program approved after August 31, 2008 (includes approval visit)--$2,000.

(4) Five-year continuing approval visit pursuant to §228.10(c) of this title (relating to Approval Process)--$1,500.

(5) Monitoring or technical assistance visit--$1,500.

(6) Addition of new certification field or addition of clinical teaching--500.

(7) Addition of each new class of certificate--$1,000.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905454

Jerel Booker

Associate Commissioner, Educator Quality and Standards, Texas Education Agency

State Board for Educator Certification

Earliest possible date of adoption: January 3, 2010

For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.33

INTRODUCTION. The Texas Board of Nursing (Board) proposes amendments to §213.33, concerning *Factors Considered for Imposition of Penalties/Sanctions and/or Fines.* The amendments are proposed under the Occupations Code §§301.452, 301.4521, 301.453, 301.4531, 301.454(d), 301.455(a) and (b), 301.4551, 301.461, 301.462, 301.467, 301.468(a), 301.501, 301.502, and 301.151 and are necessary to: (i) implement House Bill (HB) 3961, enacted by the 81st Legislature, Regular Session, effective June 19, 2009, which adds new §301.4521 to the Occupations Code Chapter 301; and (ii) adopt the Disciplinary Matrix (Matrix), which is used in the resolution of eligibility and disciplinary matters before the Board, in rule.

The Board proposed amendments to §213.33 in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6255). Based upon comments received, the Board determined that it would reconsider the amendments to §213.33 in a separate rulemaking action in lieu of adopting the amendments as proposed. The Board withdrew the proposed amendments to §213.33 in the November 6, 2009, issue of the *Texas Register* (34 TexReg 7812).

The Board is re-proposing amendments to §213.33 in this proposal to address physical and psychological evaluations under the Occupations Code §301.4521, to adopt the Matrix in rule, and to re-designate the subsections of §213.33 for consistency and cohesiveness within the section.

The Occupations Code §301.4521

HB 3961 adds new §301.4521 to Chapter 301, which authorizes the Board to: (i) require an individual to submit to a physical or psychological evaluation if the Board has probable cause to believe that the individual is unable to practice nursing safely due to physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol; and (ii) request an individual to submit to a physical or psychological evaluation if the Board believes that the individual is unable to practice nursing safely for a reason other than physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol. If the Board requires an individual to submit to an evaluation due to physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol, new §301.4521 requires the Board to submit its request in writing. Further, new §301.4521 requires the Board to describe its reasons for requiring the evaluation and to inform an individual that refusal to submit to the evaluation will result in an administrative hearing at the State Office of Administrative Hearings (SOAH) to determine whether probable cause for the evaluation exists. Further, at the conclusion of the hearing, the Administrative Law Judge (ALJ) will enter an order either requiring the individual to submit to the evaluation or rescinding the Board's demand for the evaluation. If an individual refuses to submit to the evaluation after the ALJ enters an order requiring the evaluation, new §301.4521 authorizes the Board to: (i) refuse to issue or renew the individual's license; (ii) suspend the individual's license; or (iii) issue an order limiting the individual's license. If the Board requests an individual to submit to an evaluation for a reason other than physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol, new §301.4521 also requires the Board to submit its request in writing. Under new §301.4521, the Board is required to state its reasons for the evaluation; specify the type of evaluation it is requesting; explain how it may use the evaluation; inform the individual that he or she may refuse to submit to the evaluation; and explain the procedures for submitting an evaluation in a hearing regarding the issuance or renewal of the individual's license. If an individual refuses to consent to the requested evaluation, new §301.4521 prohibits the individual from introducing an evaluation into evidence at a hearing conducted by SOAH, unless the individual meets certain, specified requirements. New §301.4521 also requires the Board to (i) establish, by rule, the qualifications for a licensed practitioner to conduct an evaluation under §301.4521 and (ii) adopt guidelines for requiring or requesting an individual to submit to an evaluation under §301.4521.

The proposed amendments to §213.33(k) and (l) implement the requirements of HB 3961 by: (i) identifying the circumstances in which an evaluation may be required or requested by the Board under new §301.4521; (ii) specifying the credentials that an evaluator must possess in order to conduct an evaluation under new §301.4521; and (iii) prescribing the required components of an evaluation under new §301.4521. Although the proposed amendments implement the requirements of HB 3961, they do not substantially alter the Board's existing policies, procedures, and requirements regarding evaluations. Rather, the proposed amendments codify the Board's existing policies, procedures, and requirements regarding evaluations. Historically, the Board has requested physical and psychological evaluations

in order to evaluate an individual's fitness to practice. Further, the Board has considered the conclusions and recommendations of evaluators when determining the appropriate remedy in disciplinary cases. The Board has typically recognized and approved evaluators based upon their education, experience, and expertise in conducting evaluations. Further, the Board has typically required each evaluator to utilize objective criteria during an evaluation to address the Board's particular areas of concern and to test an individual's psychological stability and veracity. The Board has requested physical, psychological, and forensic evaluations from individuals since 1998 and has consistently utilized evaluations in disciplinary cases since that time. Although the Board's policies, procedures, and requirements regarding evaluations have been refined over time, the essential substance of such policies, procedures, and requirements has not changed. These policies, procedures, and requirements are now being formally incorporated into the proposed amendments to §213.33, pursuant to the requirements of HB 3961.

The proposed amendments to §213.33(k) are necessary to prescribe the requirements that will apply to an evaluation required by the Board under new §301.4521(b). Proposed amended §213.33(k) specifies that the Board may require an individual to submit to an evaluation if the Board has probable cause to believe that an individual is unable to practice nursing with reasonable skill and safety because of physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol. Further, proposed amended §213.33(k) specifies (i) the credentials that a provider must possess in order to perform an evaluation under new §301.4521(b) and (ii) the requirements the evaluation must meet. Pursuant to proposed amended §213.33(k), a provider must be a Board-approved addictionologist, addictionist, medical doctor, neurologist, doctor of osteopathy, psychologist, or psychiatrist in order to conduct an evaluation required by the Board under new §301.4521(b). The proposed amendments further require the provider to possess credentials that are appropriate for the specific evaluation required by the Board. Additionally, the evaluator must be familiar with the duties appropriate to the nursing profession and the evaluation must be conducted pursuant to professionally recognized standards and methods. Proposed amended §213.33(k) also requires the evaluator to utilize objective tests and instruments during the evaluation that are designed to test an individual's psychological stability, fitness to practice, professional character, and veracity. If applicable, proposed amended §213.33(k) requires the evaluator to review an individual's prognosis and medication regime. In all cases, proposed amended §213.33(k) clarifies that the Board reserves the right to request a forensic component for any evaluation. In such cases, the evaluator must possess appropriate forensic credentials, experience, and expertise, as determined by the Board.

The proposed amendments to §213.33(l) are necessary to prescribe the requirements that will apply to an evaluation requested by the Board under new §301.4521(f). New §301.4521(f) authorizes the Board to request an evaluation for a reason other than physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol. Accordingly, the proposed amendments to §213.33(l) clarify that the Board may request an evaluation in circumstances where an individuals's prior criminal history, unprofessional conduct, or good professional character are at issue. The proposed amendments to §213.33(l) also prescribe the credentials that an evaluator must possess in order to conduct an evaluation under new §301.4521(f) and the criteria that the evaluation must meet. Under the proposed amendments, a provider must be a Board- approved forensic psychologist or forensic psychiatrist who is familiar with the duties appropriate to the nursing profession. Further, the provider must utilize objective tests and instruments that are designed to test an individual's psychological stability, fitness to practice, professional character, and veracity. Under the proposed amendments to §213.33(l), an evaluator must: (i) consider an individual's behavior or prior criminal history; and (ii) provide an opinion as to whether the individual is likely to engage in the behavior or criminal activity again and whether the individual poses any danger to the public.

The proposed amendments to §213.33(k) and (l) are necessary for several reasons. The Board is charged with protecting the health, safety, and welfare of the public from the unsafe, incompetent, unethical, or illegal conduct of licensees and individuals subject to Chapter 301. An individual's impairment creates a threat to the public's safety and welfare, regardless of whether the impairment is caused by a physical or mental condition, chemical dependency, or drug or alcohol abuse. In situations involving the impairment of an individual, the Board has determined that it has a responsibility to remove the individual from all nursing duties involving direct patient care until the individual is deemed safe to return to those duties. Further, individuals who have a substantial criminal history or who exhibit unprofessional conduct, such as misappropriation of property or falsification of documents, may also pose a serious risk to the public's safety. In these cases, the Board is particularly concerned that such conduct may be repeated in connection with the individual's practice of nursing, thereby placing vulnerable members of the public in danger and affecting the individual's ability to safely care for patients. The Board has determined that physical and psychological evaluations are useful tools in determining whether an individual is safe to practice nursing and has relied upon evaluations in the past for such purposes. However, an evaluation must be based upon reliable, verifiable, and objective information in order to be useful to the Board in making such determinations. As such, the proposed amendments to §213.33(k) and (l) are intended to ensure that an evaluation under new §301.4521 is conducted by an appropriately trained provider who specializes in the specific area relevant to the required or requested evaluation. Further, the proposed amendments to §213.33(k) and (l) require an evaluator to be familiar with the duties appropriate to the nursing profession. This proposed requirement is especially significant. In order for an evaluation to be useful to the Board, an evaluator must be able to form an opinion as to whether an individual can practice nursing safely. In order to reach such an opinion, an evaluator must be familiar with the duties that are relevant to the nursing profession. Patients under the care of a nurse are vulnerable by virtue of illness or injury and are dependent upon the nature of the nurse-patient relationship. Further, the nurse- patient relationship exists in settings other than a hospital, such as in home health, hospice care, or nursing home care. An evaluator must be familiar with the types of settings in which a nurse may work, the kinds of tasks that a nurse must be able to perform, and the skills and judgment that a nurse must utilize as part of his or her daily routine. Further, an evaluator must understand the complexities associated with providing direct patient care in any setting in order to be able to adequately assess an individual's ability to meet those responsibilities. The proposed amendments to §213.33(k) and (l) also require an evaluation to be conducted pursuant to professionally recognized standards and methods and to include the use of objective tests and instruments designed to test the psychological stability, fitness to practice, professional character, and veracity

of the individual. These proposed requirements are necessary to assist the Board in determining whether an individual is likely to be able to comply with Chapter 301 and the Board's policies and rules in the future. This is a very important factor for the Board to consider, especially in cases that involve prior criminal or unprofessional conduct. Although the Board considers all factors and circumstances in each case, the Board is especially concerned with the likelihood that an individual's dangerous or unsafe behavior may be repeated in the future. To that end, the proposed requirements are designed to ensure that evaluators utilize objective and reliable instruments to determine if an individual: (i) is being honest and forthcoming about the events that have transpired, (ii) understands the significance of the events that have transpired, (iii) has plans in place to prevent the reoccurrence of the events that have transpired; (iv) has made amends for past conduct; (v) currently possesses the physical and mental stability to practice safely, and (vi) currently possesses the professional character necessary to practice safely. If an evaluator determines that an individual may practice safely, these factors also play a large role in determining whether the individual should be subject to Board monitoring and supervision. Although the Board considers the totality of factors present in each disciplinary case, the information and data obtained during an evaluation, including an evaluator's conclusions and recommendations, are invaluable in assisting the Board in determining whether an individual is safe to practice nursing, and, if so, under what circumstances.

The Disciplinary Matrix

In 2007, the Sunset Advisory Commission (Commission) evaluated the functions of the Board and made several recommendations to the 80th Legislature. In particular, the Commission recommended that the Board adopt an enforcement matrix in rule. (see Sunset Advisory Commission Report, Recommendation 8.6, http://www.sunset.state.tx.us/80threports/final80th/79.pdf). Specifically, Recommendation 8.6 required the Board to establish, in rule, a matrix to use when determining disciplinary actions for nurses who violated state law or Board rules. The Commission noted that, "[w]hile adopting an enforcement matrix will help the Board make consistent, fair disciplinary decisions, the matrix would not be used as a one-size-fits-all approach, as the Board would maintain flexibility in determining the most appropriate sanction for each violation". The Commission also noted that the Board should take into account the licensee's compliance history, the seriousness of the violation, the threat to the public's health and safety, and other mitigating factors in developing the matrix. Further, the Commission noted that the adoption of an enforcement matrix in rule would provide the public with the opportunity to comment on the development of the matrix and would provide nurses with ready access to the Board's enforcement guidelines, which would allow them to better understand the potential consequences of violations.

House Bill (HB) 2426 was enacted during the 80th Legislative Session and amended Chapter 301 to include §301.4531, which relates to *Schedule of Sanctions.* Section 301.4531 requires the Board, by rule, to adopt a schedule of the disciplinary sanctions that the Board may impose under Chapter 301. Further, in adopting the schedule of sanctions, §301.4531 requires the Board to ensure that the severity of the sanction is appropriate to the type of violation or conduct that is the basis for the disciplinary action. The amendments to §301.4531 appear to be closely related to the recommendations of the Commission regarding the adoption of an enforcement matrix in rule. At its July 19 - 20, 2008, Board meeting, the Board proposed the adoption of amendments to 22 Texas Administrative Code §213.33. The amendments outlined a schedule of sanctions that could be imposed for violations of Chapter 301. The adopted amendments were published in the *Texas Register* on October 5, 2007, and became effective on October 10, 2007. Additionally, the Board considered and approved the development of a more comprehensive "matrix" as contemplated by the Commission. From approximately May, 2007, to April, 2008, the Eligibility and Disciplinary Task Force (Task Force) worked to develop a comprehensive disciplinary matrix which could be used to analyze violations of Chapter 301 in a fair and consistent manner, while maintaining the Board's flexibility to determine the most appropriate action in each case. Following the development of the Matrix, the Task Force recommended that the Board pilot its use. The Board approved the Matrix as a pilot at its April, 2008, Board meeting, and the Matrix was published in the *Texas Register* on May 9, 2008 (33 TexReg 3827) for public comment.

Board Staff began piloting the use of the Matrix in eligibility and disciplinary matters in May, 2008. During the pilot period, Board Staff utilized the Matrix to analyze violations of Chapter 301 and Board rules and to determine the most appropriate sanction for those violations. The Matrix was also used to: (i) develop initial recommendations/proposed orders; (ii) evaluate cases during informal conferences; (iii) refer/provide information to members of the public (attorneys, employers, licensees) so they could better understand the potential consequences of particular violations/conduct; and (iv) make recommendations during administrative hearings at SOAH. Approximately 3,600 disciplinary actions were taken against licensees during the pilot period.

At its October 22 -23, 2009, Board meeting, the Board considered and approved amendments to the Matrix. The amendments addressed various issues that Board Staff became aware of during the pilot period and incorporated changes that were made to Chapter 301 during the 81st Legislative Session. The amendments also included changes that were recommended to the Board by the Eligibility and Disciplinary Advisory Committee (Committee). The Committee convened on September 17, 2009, and considered several proposed amendments to the Matrix. Following a lengthy discussion, the Committee voted to unanimously approve the proposed amendments to the Matrix and recommend their adoption to the Board. Further, the Committee proposed three additional amendments to the Matrix and voted to recommend their adoption to the Board. The amendments that were approved and adopted by the Board at its October, 2009, meeting: (i) clarify the circumstances under which aggravating and/or mitigating circumstances may be considered by the Board; (ii) clarify the Board's authority under the Occupations Code §301.4521; (iii) clarify the applicability of the Matrix to eligibility matters; (iv) revise the amounts of fines for consistency with 22 Texas Administrative Code §213.32 (relating to *Corrective Action Proceedings and Schedule of Administrative Fines);* (v) clarify the applicability of a *corrective action* under the Occupations Code §301.651 - §301.657; (vi) provide consistency between the sanctions for a violation of the Occupations Code §301.452(b)(3) and (b)(4); (vii) clarify the available sanctions for a violation of the Occupations Code §301.452(b)(1), (9), and (10); (viii) incorporate references to the Occupations Code §301.4551 throughout the Matrix; (ix) remove the word "or" from the first sanction level for a first and second tier offense for a violation of the Occupations Code §301.452(b)(1); (x) remove the phrase "nurse is not currently practicing as a nurse" from the list of mitigating circumstances for a violation of Occupations Code §301.452(b)(9); and (xi) remove the phrase "harm to patient was

not a result of care" from the list of mitigating circumstances for a violation of the Occupations Code §301.452(b)(10). In addition to approving the amendments and adopting the Matrix, the Board also approved the proposal of the Matrix in rule.

Proposed amended §213.33(a) requires the Matrix to be utilized in all disciplinary and eligibility matters before the Board. This proposed requirement is designed to ensure consistency, efficiency, and predictability in Board decisions regarding eligibility and disciplinary matters. Proposed amended §213.33(b) sets forth the adopted Matrix. The adopted Matrix contains the amendments that were approved by the Board at its October, 2009, meeting. Those amendments have been specified previously in this proposal. The other portions of the Matrix remain unchanged from the version of the Matrix that was utilized during the pilot period.

The Matrix, as set forth in proposed amended §213.33(b), is organized by offense tiers and sanction levels. The offenses listed in the Matrix mirror the offenses specified in the Occupations Code §301.452(b)(1) - (13). Section 301.452(b)(1) - (13) prescribes the specific violations of Chapter 301 for which a person is subject to disciplinary action or denial of licensure by the Board. Each offense in the Matrix is divided into tiers. The first offense tier typically includes less serious violations that involve a low risk of harm to the public. The second, third, and fourth offense tiers typically include more serious violations that involve a greater risk of harm to the public. For each offense tier specified in the Matrix, there are two corresponding sanction levels. The first sanction level includes Board actions that are less severe in nature while the second sanction level includes Board actions that are more severe in nature. Each offense tier in the Matrix includes a description of events that might fall within that offense tier. Further, each sanction level contains a description of the disciplinary actions that could be imposed for the corresponding offense tier. These clarifications are necessary to provide notice to licensees and members of the public of the potential consequences of violations of Chapter 301. The Matrix also includes a non-exhaustive list of aggravating and mitigating factors that may be considered by the Board when determining the appropriate offense tier and sanction level for a specific offense. These clarifications are designed to assist licensees and other members of the public in understanding the circumstances that could increase or decrease the severity of a particular offense. Finally, the Matrix reiterates the differences between a corrective action and a disciplinary action. The Matrix does not address violations for which a non-disciplinary corrective action may be imposed by the Board under the Occupations Code Subchapter N and 22 Texas Administrative Code §213.32. Rather, the Matrix addresses only those violations for which a disciplinary action under the Occupations Code Subchapter J may be imposed by the Board. This clarification is necessary to further define the scope of the Matrix.

Remaining amendments

The Occupations Code Chapters 53 and 301 require the Board to consider certain factors when determining the appropriate action in a disciplinary matter. The Board has determined that these factors should be considered in conjunction with the Matrix. As such, the proposed amendments to §213.33(c) specify at least 17 factors that must be considered in determining the appropriate offense tier and sanction level of the Matrix for a particular offense. The proposed amendments to §213.33(c) are necessary to ensure that the unique factors in each disciplinary matter before the Board are fully considered before a final determination is made regarding the imposition of a disciplinary action. This enhanced review should promote fair decisions in all disciplinary matters before the Board and should result in better protection of the public, as the presence of aggravating factors should result in more severe disciplinary actions, while the presence of mitigating factors should result in less severe disciplinary actions.

The proposed amendments to §213.22(e) are necessary to specify the probationary stipulations that may accompany a specific disciplinary action. Before a disciplinary action may be imposed in any particular matter, the factors specified in proposed amended §213.33 (c) must be evaluated and the appropriate offense tier and sanction level of the Matrix must be determined. Once an offense tier and sanction level are determined, a corresponding disciplinary action may be imposed. Proposed amended §213.33(e) lists the probationary stipulations that may accompany the imposed disciplinary action. The proposed amendments to §213.33(e) are necessary to provide notice to licensees and other members of the public of the potential consequences of violations of Chapter 301, including which probationary stipulations are likely to accompany a specific disciplinary action.

Further, the proposed amendments to §213.22(e) clarify the Board's existing policy regarding random drug testing through urinalysis. If an individual is placed under Board monitoring for chemical dependency or the misuse or abuse of alcohol or drugs, the Board typically requires the individual to submit to random drug screening for a specified period of time as part of the probationary stipulations of the disciplinary action. The Board requires an individual to be tested for approximately fourteen prohibited substances, including alcohol. The Board has required its random drug screening to be verified through urinalysis since at least 1989. Over the years, the Board has found urinalysis to be a reliable method for screening for prohibited substances, including alcohol. Further, the Board contracts with a third party vendor to conduct its drug screening, and the Board's vendor utilizes urinalysis to verify the results of the screens. The proposed amendments to §213.33(e) formally codify the Board's existing policy regarding random drug testing by clarifying that all random drug testing must be verified through urinalysis.

Finally, the proposed amendments to §213.33(g) are necessary to clarify that the Board's adopted polices regarding fraud, theft, and deception; lying and falsification; sexual misconduct; criminal conduct, and substance abuse, misuse, substance dependency, or substance use disorder also apply in eligibility and disciplinary matters. Further, the proposed amendments to §213.33(h) are necessary to clarify that, to the extent that a conflict exists between the Matrix and the Board's adopted eligibility and disciplinary policies specified in proposed amended §213.33(g), the Matrix controls.

Section-by-Section Overview. The following is a section-by-section overview of the proposal. The proposed amended title of §213.33 reads: "Factors Considered for Imposition of Penalties/Sanctions".

Proposed amended §213.33(a) states that the Board and SOAH shall utilize the Matrix set forth in §213.33(b) in all disciplinary and eligibility matters. Proposed amended §213.33(b) sets forth the Matrix.

Proposed amended §213.33(c) provides that the Board and SOAH shall consider certain factors in conjunction with the

Matrix when determining the appropriate penalty/sanction in disciplinary and eligibility matters. The factors shall be analyzed in determining the tier and sanction level of the Matrix for a particular violation or multiple violations of the Nursing Practice Act (NPA) and Board rules. The factors include: (i) evidence of actual or potential harm to patients, clients, or the public; (ii) evidence of a lack of truthfulness of trustworthiness; (iii) evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) represented where such reliance could be unsafe; (iv) evidence of practice history; (v) evidence of present fitness to practice; (vi) whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions; (vii) the length of time the person has practiced; (viii) the actual damages, physical, economic, or otherwise, resulting from the violation; (ix) the deterrent effect of the penalty imposed; (x) attempts by the licenses to correct or stop the violation; (xi) any mitigating or aggravating circumstances, including those specified in the Matrix; (xii) the extent to which system dynamics in the practice setting contributed to the problem; (xiii) whether the person is being disciplined for multiple violations of the NPA or its derivative rules and orders; (xiv) the seriousness of the violation; (xv) the threat to public safety; (xvi) evidence of good professional character as set forth and required by §213.27 (relating to *Good Professional Character);* and (xvii) any other matter that justice may require.

Proposed amended §213.33(d) provides that each specific act or instance of conduct may be treated as a separate violation.

Proposed amended §213.33(e) states that, the Board may, upon the finding of a violation, enter an order imposing one or more of the following disciplinary actions, with or without probationary stipulations: (i) denial of the person's application for a license; license renewal; reinstatement of a revoked, suspended, or surrendered license; or temporary permit; (ii) approval of the person's application for a license; license renewal; reinstatement of a revoked, suspended, or surrendered license; or temporary permit, with reasonable probationary stipulations; (iii) probation of an order denying a license application, license renewal, license reinstatement, or temporary permit, with reasonable probationary stipulations including submitting to care, supervision, counseling, or treatment by a health provider designated by the Board; submitting to an evaluation as outlined in §213.33(k) and (l) or pursuant to the Occupations Code §301.4521; participating in a program of education or counseling prescribed by the Board; limiting specific nursing activities and/or periodic Board review; practicing for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; abstaining from the unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or performing public service which the Board considers appropriate; (iv) issuance of a warning, with reasonable probationary stipulations including submitting to care, supervision, counseling, or treatment by a health provider designated by the Board; submitting to an evaluation as outlined in §213.33(k) and (l) or pursuant to the Occupations Code §301.4521; participating in a program of education or counseling prescribed by the Board; limiting specific nursing activities and/or periodic Board review; practicing for a specified period of at least one year under the direction of a registered nurse or vocational nurse designated by the Board; abstaining from the unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or performing public service which the Board considers appropriate; (v) issuance of a reprimand, with reasonable probationary stipulations including submitting to care, supervision, counseling, or treatment by a health provider designated by the Board; submitting to an evaluation as outlined in subsections (k) and (l) or pursuant to the Occupations Code §301.4521; participating in a program of education or counseling prescribed by the Board; limiting specific nursing activities and/or periodic Board review; practicing for a specified period of at least two years under the direction of a registered nurse or vocational nurse designated by the Board; abstaining from the unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or performing public service which the Board considers appropriate; (vi) limitation or restriction of the person's license, including limits on specific nursing activities or periodic Board review; (vii) suspension of the person's license, which may be enforced and active for a specific period and/or probated with reasonable probationary stipulations, including submitting to care, supervision, counseling, or treatment by a health provider designated by the Board; submitting to an evaluation as outlined in subsections (k) and (l) or pursuant to the Occupations Code §301.4521; participating in a program of education or counseling prescribed by the Board; limiting specific nursing activities and/or periodic Board review; practicing for a specified period of not less than two years under the direction of a registered nurse or vocational nurse designated by the Board; abstaining from the unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or performing public service which the Board considers appropriate; (viii) remit payment of the administrative penalty, fine, or assessment of hearing costs; (ix) acceptance of a voluntary surrender of a nurse's license(s); (x) revocation of the person's license; (xi) require participation in remedial education course or courses prescribed by the Board which are designed to address those competency deficiencies identified by the Board; (xii) assessment of a fine as set forth in §213.32 (relating to *Corrective Action Proceedings and Schedule of Administrative Fines);* (xiii) assessment of costs as authorized by the Occupations Code §301.461 and the Government Code §2001.177; or (xiv) require successful completion of a Board approved peer assistance program.

Proposed amended §213.33(f) provides that every disciplinary order issued by the Board shall require the person subject to the order to participate in a program of education or counseling prescribed by the Board, which, at a minimum, will include a review course in nursing jurisprudence and ethics.

Proposed amended §213.33(g) states that the following disciplinary and eligibility sanction policies and guidelines shall be used by the Board and SOAH when determining the appropriate penalty/sanction in disciplinary and eligibility matters: (i) Disciplinary Sanctions for Fraud, Theft, and Deception approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1646) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html; (ii) Disciplinary Sanctions for Lying and Falsification approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1647) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html; (iii) Disciplinary Sanctions for Sexual Misconduct approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1649) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html; (iv)

Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder and published on February 22, 2008 in the *Texas Register* (33 TexReg 1651) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html; and (v) Disciplinary Guidelines for Criminal Conduct approved by the Board and published on March 9, 2007 in the *Texas Register* (32 TexReg 1409) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html.

Proposed amended §213.33(h) states that, to the extent that a conflict exists between the Matrix and a disciplinary and eligibility sanction policy described in proposed amended §213.33(g), the Matrix controls. Proposed amended §213.33(i) provides that, unless otherwise specified, fines shall be payable in full by cashier's check or money order not later than the 45th day following the entry of an Order. Proposed amended §213.33(j) states that the payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and the Board's rules.

Proposed amended §213.33(k) provides that, if the Board has probable cause to believe that a person is unable to practice nursing with reasonable skill and safety because of physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol, the Board may require an evaluation by a Board-approved addictionologist, addictionist, medical doctor, neurologist, doctor of osteopathy, psychologist, or psychiatrist, with credentials appropriate for the specific evaluation requested, as determined by the Board. In all cases, the evaluator must possess credentials, expertise, and experience appropriate for conducting the requested evaluation, as determined by the Board. Further, the Board reserves the right to request a forensic component for any evaluation. In such cases, the evaluator must possess forensic credentials, expertise, and experience appropriate for conducting the requested forensic evaluation, as determined by the Board. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments, as determined and requested by the Board, which are designed to test the psychological stability, fitness to practice, professional character, and veracity of the person subject to evaluation. If applicable, the evaluation must include information regarding the person's prognosis and medication regime. The person subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The person subject to evaluation should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person a copy.

Proposed amended §213.33(l) states that, when determining evidence of present fitness to practice because of known or reported unprofessional conduct, lack of good professional character, or prior criminal history, the Board may request an evaluation conducted by a Board-approved forensic psychologist or forensic psychiatrist who: (i) evaluates the behavior in question or the prior criminal history of the person; (ii) seeks to predict the likelihood that the person subject to evaluation will engage in the behavior in question or criminal activity again, which may result in the person committing a second or subsequent reportable violation or receiving a second or subsequent reportable adjudication or conviction; and the continuing danger, if any, that the person poses to the community; (iii) is familiar with the duties appropriate to the nursing profession; (iv) conducts the evaluation pursuant to professionally recognized standards and methods; and (v) utilizes objective tests and instruments, as determined and requested by the Board, that are designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the person subject to evaluation. Further, the person subject to evaluation shall sign a release allowing the evaluator to review the file compiled by Board staff and a release that permits the evaluator to release the evaluation to the Board. The person subject to evaluation should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person a copy. Further, the provisions of the Occupations Code §301.4521 apply to an evaluation requested under 213.33(l).

FISCAL NOTE. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, there will be public benefits, and there will be potential costs for individuals required to comply with the proposal.

Anticipated Public Benefits. The anticipated public benefits will be the adoption of requirements that (i) implement the provisions of the Occupations Code §301.4521 and (ii) promote consistency, efficiency, and predictability in Board decisions regarding eligibility and disciplinary matters.

The Board is charged with protecting the health, safety, and welfare of the public from the unsafe, incompetent, unethical, or illegal conduct of licensees and individuals subject to Chapter 301. When an individual has exhibited impaired behavior, either due to chemical dependency or the abuse of alcohol or drugs, or due to a physical or mental condition, the Board has a responsibility to remove the individual from all nursing duties involving direct patient care until the individual is deemed safe to return to those duties. Further, when an individual has exhibited unprofessional character, including criminal conduct, the Board has a responsibility to ensure that the individual does not pose a risk to the public's safety. The Board is particularly concerned about such conduct as it relates to the individual's nursing practice, as such behaviors may place vulnerable members of the public in danger and could affect the individual's ability to safely care for patients. The proposed amendments to §213.33(k) and (l), which implement the requirements of §301.4521, provide the Board with an additional tool in determining an individual's fitness to practice. The proposed amendments prescribe the specific circumstances in which the Board will require or request an individual to submit to a physical or psychological evaluation. Further, the proposed amendments require all evaluations to be conducted by an appropriately trained provider and to be based upon objective, verifiable information. Often, the Board will review an evaluator's recommendations before imposing specific probationary stipulations in a disciplinary matter. In order to ensure that the most appropriate probationary stipulations are imposed, the Board must be able to determine that an evaluator's recommendations are based upon objective, verifiable, information. The proposed amendments also require an evaluator to be familiar with the duties of the nursing profession. This proposed requirement is especially important because an evaluator must be able to assess the settings in which an individual may

work, the specific tasks that an individual must perform, and the skills and judgment that the individual must utilize as part of his or her daily routine. Further, the evaluator must be able to assess whether the individual can safely perform his or her nursing responsibilities in a specific setting. The proposed requirements also assist the Board in determining whether an individual will be able to comply with the NPA and the Board's policies and rules in the future. This is a significant factor for consideration, especially as it relates to the likelihood that dangerous or unsafe behavior may be repeated in the future.

Further, the proposed amendments promote consistency, efficiency, and predictability in Board decisions regarding eligibility and disciplinary matters. The proposed amendments incorporate the use of the Matrix in all eligibility and disciplinary matters before the Board. The Matrix clearly sets forth the potential consequences of violations of Chapter 301 and Board rules and policies. In doing so, the Board is providing notice to licensees and other members of the public of the potential consequences of violations of Chapter 301 and Board policies and rules. Adequate notice of such consequences promotes fair and efficient regulation. Further, the Matrix describes events that may qualify as offenses under the Occupations Code §301.452(b)(1) - (13). This clarification may assist licensees and other members of the public in understanding how certain events may be viewed by the Board in conjunction with §301.452(b)(1) - (13). The Matrix also provides guidance to licensees and other members of the public regarding the effect of aggravating and mitigating factors in eligibility and disciplinary matters. This clarification is especially important because it communicates the Board's expectations regarding the severity of certain reported conduct. Establishing such expectations results in fair and efficient regulation. Finally, the proposed amendments ensure consistency among Board policies, procedures, and requirements regarding random drug screening. By clarifying the Board's existing policy that all random drug screening must be verified through urinalysis, the Board is providing appropriate notice to all regulated individuals of the Board's existing policies and expectations in this regard, which also results in fair and consistent regulation.

Potential Costs for Individuals Required to Comply with the Proposal.

The proposal authorizes the Board to: (i) require an individual to submit to a physical or psychological evaluation if the Board has probable cause to believe that the individual is unable to practice nursing safely due to physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol; and (ii) request an individual to submit to a physical or psychological evaluation if the Board believes that the individual is unable to practice nursing safely for a reason other than physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol. The proposal also (i) identifies the circumstances in which an evaluation may be required or requested by the Board under new §301.4521, (ii) specifies the credentials that an evaluator must possess in order to conduct an evaluation under new §301.4521, and (iii) prescribes the required components of an evaluation under new §301.4521. Further, the proposal requires that the Matrix be utilized in all eligibility and disciplinary matters before the Board and prescribes the probationary stipulations that may be imposed as part of a disciplinary action. Not every individual regulated under Chapter 301 will be subject to the proposal. Only those individuals who (i) are involved in an eligibility or disciplinary matter before the Board or (ii) are requested or required to submit to a physical or psychological evaluation under new §301.4521 will be affected by the proposal. There will be associated costs of compliance with the proposal for such individuals. The probable costs associated with the proposed amendments result from compliance with proposed amended §213.33(a), (b), (e), (f), (i), (j), (k), and (l).

Proposed amended §213.33(a) requires that the Matrix be utilized in all eligibility and disciplinary matters before the Board. Proposed amended §213.33(b) sets forth the Matrix. Proposed amended §213.33(e) prescribes the probationary stipulations that may accompany a disciplinary action. Proposed amended §213.33(f) provides that every disciplinary order issued by the Board shall require the individual subject to the order to participate in a program of education or counseling prescribed by the Board, which, shall include a review course in nursing jurisprudence and ethics. Proposed amended §213.33(i) requires all fines to be paid not later than the 45th day following the entry of an order, unless otherwise specified. Proposed amended §213.33(j) provides that the payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and Board rules. Finally, proposed amended §213.33 (g) clarifies that all random drug screening must be verified through urinalysis.

If an individual becomes involved in an eligibility or disciplinary matter before the Board, the total probable costs of compliance with the proposed amendments to §213.33(a), (b), (e), (f), (i), and (j) will vary substantially among individuals depending upon several factors, including: (i) the nature of the reported offense; (ii) the severity of the reported offense; (iii) whether any aggravating or mitigating factors contributed to the reported offense; (iv) the resulting disciplinary action; (v) the specific probationary stipulations imposed in conjunction with the disciplinary action; and (vi) whether an individual chooses to retain legal representation. The amount of the total probable compliance costs will primarily depend upon the severity of the reported offense. For example, if the reported conduct of an individual in an eligibility or disciplinary matter results in a less severe disciplinary action because mitigating factors are present, the associated probationary stipulations are likely to be less severe and fewer in number, which should decrease the associated costs of compliance. In such a case, an individual may only be required to pay a $250 fine and complete a course in jurisprudence and ethics. The total costs of compliance in such a case should not exceed $600. However, if an individual's reported conduct is more severe in nature and involves practice deficiencies, for example, the associated probationary stipulations are likely to be more severe and numerous in nature, and could include several remedial education courses, practice restrictions, and Board monitoring. Several types of remedial education courses may be imposed in a particular matter. Some of these courses may be completed online, while others require classroom instruction. The Board does not require an individual to complete a specific remedial education course offered by a specific provider. Instead, the Board publishes a list of approved providers that offer remedial education courses. This list is located on the Board's website, at: http://www.bon.state.tx.us/disciplinaryaction/stipscourses.html. Each individual is free to chose the most economic means of completing a remedial education course, provided that the course meets the requirements of the individual's probationary stipulations.

Further, if an individual's reported conduct is related to chemical dependency or abuse of drugs or alcohol, the probationary stipulations associated with the disciplinary action are likely to include random drug testing conducted through urinalysis and extensive monitoring stipulations. The total probable costs as-

sociated with random drug testing will vary from individual to individual based upon the (i) length of time that an individual must submit to random drug screening and (ii) the number of screens that an individual must submit. An individual will typically be required to submit to random drug screening for a period of 1 - 3 years. During this time, an individual will be required to test once a week for the first three month period. An individual will be required to test twice a month for the next three month period. An individual will be required to test once a month for the next six month period. An individual will be required to test once a quarter for the remainder of the testing period. The Board estimates that each test will cost $46.00. Based upon this estimate, the Board anticipates that a one year testing period will cost approximately $1,152; a two year testing period will cost approximately $1,336; and a three year testing period will cost approximately $1,520. Although individuals are not typically required to test beyond three years, there may be instances where a longer testing period is required. In those situations, the Board estimates that it will cost an individual an additional $184 per year to complete the required random screens. Further, if an individual is required to re-submit a screen for any reason, each screen is anticipated to cost an additional $46.

A fine may or may not be imposed as part of a disciplinary action, depending upon the nature of the reported conduct. If a fine is imposed, the amount will vary among individuals depending upon: (i) the nature of the reported conduct; (ii) whether multiple violations of Chapter 301 are at issue; (iii) whether the individual has been subject to disciplinary action previously; and (iv) the specific sanction level and offense tier that is related to the reported conduct. As provided by 22 Texas Administrative Code §213.32, the Board may impose a fine in the amount of $250 - $5,000 per occurrence, depending upon the specific factors involved. If a fine is imposed and is less than $750, the fine must be paid within 45 days of the entry of the disciplinary action. Typically, an individual will be given an additional 45 days to pay a fine for each $750 increment. For example, an individual would be given 90 days to pay a fine greater than $750, but less than $1,500. An individual would be given 135 days to pay a fine greater than $1,500, but less than $2,250, and so on. The payment of the fine is also in addition to any other fees that must be paid. The Occupations Code §301.501 authorizes the Board to impose an administrative penalty on a person licensed or regulated under Chapter 301 who violates Chapter 301 or a rule or order adopted under Chapter 301. Further, the Occupations Code §301.502 provides that the amount of the administrative penalty shall not exceed $5,000 for each violation, and that each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

An individual is not required to be represented by an attorney in eligibility or disciplinary matters before the Board. However, an individual may choose to be represented by an attorney. For those individuals who choose to utilize the services of an attorney, the associated costs will vary substantially among individuals depending upon several factors, including: (i) the complexity of the individual's case; (ii) the amount of time incurred by the attorney; (iii) the rate charged by the attorney; (iv) whether the attorney must travel to Austin, Texas, for any proceedings; and (v) whether the matter is resolved informally or must proceed to SOAH. Each individual has the information necessary to estimate his or her own compliance costs with proposed amended §213.33(a), (b), (e), (f), (i), and (j). Further, any other costs to comply with the proposal result from the enactment of the Occupations Code Chapters 53 and 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Proposed amended §213.33(k) and (l) identify the circumstances in which an evaluation may be required or requested by the Board under new §301.4521. Proposed amended §213.33(k) and (l) also prescribe the credentials that an evaluator must possess in order to conduct an evaluation under new §301.4521 and specify the criteria that an evaluation must meet under new §301.4521. Specifically, the proposed amendments to §213.33(k) and (l) require an evaluation under new §301.4521 to be conducted by a Board approved addictionologist, addictionist, medical doctor, neurologist, doctor of osteopathy, psychologist, or psychiatrist with credentials appropriate for the specific evaluation requested or required by the Board. Further, the proposed amendments to §213.33(k) and (l) require the evaluator to be familiar with the duties appropriate to the nursing profession. Additionally, the proposed amendments to §213.33(k) and (l) require an evaluation to be conducted pursuant to professionally recognized standards and methods and to include the utilization of objective tests and instruments which are designed to test an individual's psychological stability, fitness to practice, professional character, and veracity. If an individual is requested to submit to an evaluation under new §301.4521, the total probable costs to comply with the proposed amendments will vary substantially among individuals, primarily based upon the cost assessed by the particular evaluator performing the requested evaluation. The Board generally estimates that an evaluation under new §301.4521 may cost between $850 - $2,000. However, the Board anticipates that the probable costs of an evaluation under new §301.4521 will vary substantially from provider to provider, based upon the following factors: (i) the type and nature of the evaluation; (ii) the type of provider that is qualified to perform the evaluation; (iii) the availability of a qualified provider to conduct the evaluation; (iv) the amount and type of objective tests utilized by an evaluator; (iv) the geographic location of the individual; (v) the geographic location of the evaluator; (vi) whether an evaluator performs evaluations on a frequent basis; (vii) the familiarity of an evaluator with the requirements of new §301.4521, the proposed amendments, and Board policies and procedures; (viii) the complexity of the issues in the case; (ix) the history of the individual; (x) the amount of time it will take for the evaluator to conduct the evaluation, including the administration of objective tests; and (xi) the amount of time it will take the evaluator to prepare his or her report. The proposed amendments to §213.33(k) and (l) establish the credentials that a provider must possess in order to perform an evaluation under new §301.4521. The proposed amendments also prescribe the criteria that an evaluation under new §301.4521 must meet. However, the Board is not requiring an individual to obtain an evaluation from a particular evaluator. Although the Board maintains a list of pre-approved evaluators who may conduct an evaluation, an individual is not obligated to obtain an evaluation from one of the listed providers. An individual may choose to obtain an evaluation from any provider, so long as the provider meets the proposed requirements of §213.33(k) and (l) and new §301.4521. As such, each individual is free to choose the most economical way to obtain an evaluation under new §301.4521 and the proposed amendments. Each individual also has the information necessary to estimate his or her own compliance costs. Further, new §301.4521(i) states that an individual shall pay the costs of an evaluation conducted under new §301.4521. Any other costs to comply with the proposal result from the enactment of the Occupations Code Chapter 301 and are not

a result of the adoption, enforcement, or administration of the proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.

As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed amendments will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposal because no individual, Board regulated entity, or other entity required to comply with the proposal meets the definition of a small or micro business under the Government Code §2006.001(1) or (2). The Government Code §2006.001(1) defines a micro business as a legal entity, including a corporation, partnership, or sole proprietorship that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has not more than 20 employees. The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of the elements in §2006.001(1) and (2) must be met in order for an entity to qualify as a micro business or small business. The only entities subject to the proposal are individuals regulated under Chapter 301. Because such individuals are not independently owned and operated legal entities that are formed for the purpose of making a profit, no individual regulated under Chapter 301 qualifies as a micro business or small business under the Government Code §2006.001(1) or (2). Therefore, in accordance with the Government Code §2006.002(c) and (f), the Board is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code 2007.043.

REQUEST FOR PUBLIC COMMENT.

To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on January 3, 2010, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY.

The amendments are proposed under the Occupations Code §§301.452, 301.4521, 301.453, 301.4531, 301.454(d), 301.455(a) and (b), 301.4551, 301.461, 301.462, 301.467, 301.468(a), 301.501, 301.502, and 301.151. Section 301.452(a) defines intemperate use to include practicing nursing or being on duty or on call while under the influence of alcohol or drugs. Section 301.452(b) provides that a person is subject to denial of a license or to disciplinary action under Subchapter J for: (i) a violation of Chapter 301, a rule or regulation not inconsistent with Chapter 301, or an order issued under Chapter 301; (ii) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing; (iii) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; (iv) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; (v) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; (vi) impersonating or acting as a proxy for another person in the licensing examination required under §301.253 or §301.255; (vii) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing; (viii) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction; (ix) intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient; (x) unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public; (xi) adjudication of mental incompetency; (xii) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or (xiii) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm. Section 301.452(c) provides that the Board may refuse to admit a person to a licensing examination for a ground described under §301.452(b).

Section 301.4521(a) defines the term *applicant* as a petitioner for a declaratory order of eligibility for a license or an applicant for an initial license or renewal of a license and the term *evaluation* as a physical or psychological evaluation conducted to determine a person's fitness to practice nursing. Section 301.4521(b) provides that the Board may require a nurse or applicant to submit to an evaluation only if the Board has probable cause to believe that the nurse or applicant is unable to practice nursing with reasonable skill and safety to patients because of: (i) physical impairment; (ii) mental impairment; or (iii) chemical dependency or abuse of drugs or alcohol. Section 301.4521(c) provides that a demand for an evaluation under §301.4521(b) must be in writing and state: (i) the reasons probable cause exists to require the evaluation; and (ii) that refusal by the nurse or applicant to submit to the evaluation will result in an administrative hearing to be held to make a final determination of whether probable cause for the evaluation exists. Section 301.4521(d) states that, if the nurse or applicant refuses to submit to the evaluation, the Board shall schedule a hearing on the issue of probable cause to be conducted by SOAH. The nurse or applicant must be notified of the hearing by personal service or certified mail. The hearing is limited to the issue of whether the Board had probable cause to require an evaluation. The nurse or applicant may present testimony and other evidence at the hearing to show why the nurse or applicant should not be required to submit to the evaluation. The Board has the burden of proving that probable cause exists. At the conclusion of the hearing, the hearing officer shall enter an order requiring the nurse or applicant to submit to the evaluation or an order rescinding the Board's demand for an evaluation. The order may not be vacated or modified under the Government Code §2001.058. Section 301.4521(e) states that, if a nurse or applicant refuses to submit to an evaluation after an order requiring the evaluation is entered under §301.4521(d), the Board may: (i) refuse to issue or renew a license; (ii) suspend a license; or (iii) issue an order limiting the license. Section 301.452(f) provides that the Board may request a nurse or applicant to consent to an evaluation by a practitioner approved by the Board

for a reason other than a reason listed in §301.4521(b). A request for an evaluation under §301.4521(f) must be in writing and state: (i) the reasons for the request; (ii) the type of evaluation requested; (iii) how the Board may use the evaluation; (iv) that the nurse or applicant may refuse to submit to an evaluation; and (v) the procedures for submitting an evaluation as evidence in any hearing regarding the issuance or renewal of the nurse's or applicant's license. Section 301.4521(g) states that, if a nurse or applicant refuses to consent to an evaluation under §301.4521(f), the nurse or applicant may not introduce an evaluation into evidence at a hearing to determine the nurse's or applicant's right to be issued or retain a nursing license unless the nurse or applicant: (i) not later than the 30th day before the date of the hearing, notifies the Board that an evaluation will be introduced into evidence at the hearing; (ii) provides the Board the results of that evaluation; (iii) informs the Board of any other evaluations by any other practitioners; and (iv) consents to an evaluation by a practitioner that meets Board standards established under §301.4521(h). Section 301.4521(h) provides that the Board shall establish by rule the qualifications for a licensed practitioner to conduct an evaluation under §301.4521. The Board shall maintain a list of qualified practitioners. The Board may solicit qualified practitioners located throughout the state to be on the list. Section 301.4521(i) states that a nurse or applicant shall pay the costs of an evaluation conducted under §301.4521. Section 301.4521(j) provides that the results of an evaluation under §301.4521 are: (i) confidential and not subject to disclosure under the Government Code Chapter 552; (ii) not subject to disclosure by discovery, subpoena, or other means of legal compulsion for release to anyone, except that the results may be: (A) introduced as evidence in a proceeding before the Board or a hearing conducted by SOAH under Chapter 301; or (B) included in the findings of fact and conclusions of law in a final Board order. Section 301.4521(k) provides that, if the Board determines there is insufficient evidence to bring action against a person based on the results of any evaluation under §301.4521, the evaluation must be expunged from the Board's records. Section 301.4521(l) requires the Board to adopt guidelines for requiring or requesting a nurse or applicant to submit to an evaluation under §301.4521. Section 301.4521(m) states that the authority granted to the Board under §301.4521 is in addition to the Board's authority to make licensing decisions under Chapter 301.

Section 301.453(a) provides that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (i) denial of the person's application for a license, license renewal, or temporary permit; (ii) issuance of a written warning; (iii) administration of a public reprimand; (iv) limitation or restriction of the person's license, including limiting to or excluding from the person's practice one or more specified activities of nursing or stipulating periodic Board review; (v) suspension of the person's license for a period not to exceed five years; (vi) revocation of the person's license; or (vii) assessment of a fine. Section 301.453(b) provides that, in addition to or instead of an action under §301.453(a), the Board, by order, may require the person to: (i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license; (ii) participate in a program of education or counseling prescribed by the Board; (iii) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; or (iv) perform public service the Board considers appropriate. Section 301.453(c) provides that the Board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. The Board may not reinstate a surrendered license unless it determines that the person is competent to resume practice. Section 301.453(d) states that if the Board suspends, revokes, or accepts surrender of a license, the Board may impose conditions for reinstatement that the person must satisfy before the Board may issue an unrestricted license.

Section 301.4531(a) states that the Board by rule shall adopt a schedule of the disciplinary sanctions that the Board may impose under Chapter 301. In adopting the schedule of sanctions, the Board shall ensure that the severity of the sanction imposed is appropriate to the type of violation or conduct that is the basis for disciplinary action. Section 301.4531(b) states, in determining the appropriate disciplinary action, including the amount of any administrative penalty to assess, the Board shall consider: (i) whether the person is being disciplined for multiple violations of either Chapter 301 or a rule or order adopted under Chapter 301 or has previously been the subject of disciplinary action by the Board and has previously complied with Board rules and Chapter 301; (ii) the seriousness of the violation; (iii) the threat to public safety; and (iv) any mitigating factors. Section 301.4531(c) provides that, in the case of a person described by §301.4531(b)(1)(A), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a single violation; and in the case of a person described by §301.4531(b)(1)(B), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a person who has not previously been the subject of disciplinary action by the Board.

Section 301.454(d) provides that SOAH shall use the schedule of sanctions adopted by the Board for any sanction imposed as the result of a hearing conducted by SOAH.

Section 301.455(a) provides that the license of a nurse shall be temporarily suspended or restricted on a determination by a majority of the Board or a three-member committee of Board members designated by the Board that, from the evidence or information presented, the continued practice of the nurse would constitute a continuing and imminent threat to the public welfare. Section 301.455(b) provides that a license may be temporarily suspended or restricted under §301.455 without notice or hearing on the complaint if: (i) institution of proceedings for a hearing before SOAH is initiated simultaneously with the temporary suspension or determination to restrict; and (ii) a hearing is held as soon as possible under Chapter 301 and the Government Code Chapter 2001.

Section 301.4551 provides that the Board shall temporarily suspend the license of a nurse as provided by §301.455 if the nurse is under a Board order prohibiting the use of alcohol or a drug or requiring the nurse to participate in a peer assistance program, and the nurse tests positive for alcohol or a prohibited drug; refuses to comply with a Board order to submit to a drug or alcohol test; or fails to participate in the peer assistance program and the program issues a letter of dismissal and referral to the Board for noncompliance.

Section 301.461 states that the Board may assess a person who is found to have violated Chapter 301 the administrative costs of conducting a hearing to determine the violation.

Section 301.462 provides that the Board may revoke a nurse's license without formal charges, notice, or opportunity of hearing if

the nurse voluntarily surrenders the nurse's license to the Board and executes a sworn statement that the nurse does not desire to be licensed.

Section 301.467(a) provides that on application, the Board may reinstate a license to practice nursing to a person whose license has been revoked, suspended, or surrendered. Section 301.467(b) provides that an application to reinstate a revoked license (i) may not be made before the first anniversary of the date of the revocation and (ii) must be made in the manner and form the Board requires. Section 301.467(c) provides that, if the Board denies an application for reinstatement, it may set a reasonable waiting period before the applicant may reapply for reinstatement.

Section 301.468(a) provides that the Board may determine that an order denying a license application or suspending a license be probated. A person subject to a probation order shall conform to each condition the Board sets as the terms of probation, including a condition: (i) limiting the practice of the person to, or excluding, one or more specified activities of professional nursing or vocational nursing; or (ii) requiring the person to submit to supervision, care, counseling, or treatment by a practitioner designated by the Board.

Section 301.501 provides that the Board may impose an administrative penalty on a person licensed or regulated under Chapter 301 who violates Chapter 301 or a rule or order adopted under Chapter 301.

Section 301.502(a) states that the amount of the administrative penalty may not exceed $5,000 for each violation. Further, each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. Section 301.502(b) states that the amount of the penalty shall be based on: (i) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts and the hazard or potential hazard created to the health, safety, or economic welfare of the public; (ii) the economic harm to property or the environment caused by the violation; (iii) the history of previous violations; (iv) the amount necessary to deter a future violation; (v) efforts made to correct the violation; and (vi) any other matter that justice may require.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of (iv) professional conduct for license holders Chapter 301; and determine whether an act constitutes the practice of professional nursing or vocational nursing.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal:

§213.33 §§301.452, 301.4521, 301.453, 301.4531, 301.454(d), 301.455(a) and (b), 301.4551, 301.461, 301.462, 301.467, 301.468(a), 301.501, 301.502, and 301.151.

§213.33. Factors Considered for Imposition of Penalties/Sanctions [~~and/or Fines~~].

(a) The Board and the State Office of Administrative Hearings (SOAH) shall utilize the Disciplinary Matrix set forth in subsection (b) of this section in all disciplinary and eligibility matters.

[~~(a) The following factors shall be considered by the executive director when determining whether to dispose of a disciplinary case by fine or by fine and stipulation and the amount of such fine. These factors shall be used by the State Office of Administrative Hearings (SOAH) when recommending a sanction and the Board in determining the appropriate penalty/sanction in disciplinary cases:~~]

[~~(1) evidence of actual or potential harm to patients, clients, or the public;~~]

[~~(2) evidence of a lack of truthfulness or trustworthiness;~~]

[~~(3) evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe;~~]

[~~(4) evidence of practice history;~~]

[~~(5) evidence of present fitness to practice;~~]

[~~(6) evidence of previous violations or prior disciplinary history by the Board or any other health care licensing agency in Texas or another jurisdiction;~~]

[~~(7) the length of time the licensee has practiced;~~]

[~~(8) the actual damages, physical, economic, or otherwise, resulting from the violation;~~]

[~~(9) the deterrent effect of the penalty imposed;~~]

[~~(10) attempts by the licensee to correct or stop the violation;~~]

[~~(11) any mitigating or aggravating circumstances;~~]

[~~(12) the extent to which system dynamics in the practice setting contributed to the problem; and~~]

[~~(13) any other matter that justice may require.~~]

(b) The Disciplinary Matrix is as follows:
Figure: 22 TAC §213.33(b)

[~~(b) Each specific act or instance of conduct may be treated as a separate violation.~~]

(c) The Board and SOAH shall consider the following factors in conjunction with the Disciplinary Matrix when determining the appropriate penalty/sanction in disciplinary and eligibility matters. The following factors shall be analyzed in determining the tier and sanction level of the Disciplinary Matrix for a particular violation or multiple violations of the Nursing Practice Act (NPA) and Board rules:

(1) evidence of actual or potential harm to patients, clients, or the public;

(2) evidence of a lack of truthfulness or trustworthiness;

(3) evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe;

(4) evidence of practice history;

(5) evidence of present fitness to practice;

(6) whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions;

(7) the length of time the person has practiced;

(8) the actual damages, physical, economic, or otherwise, resulting from the violation;

(9) the deterrent effect of the penalty imposed;

(10) attempts by the licensee to correct or stop the violation;

(11) any mitigating or aggravating circumstances, including those specified in the Disciplinary Matrix;

(12) the extent to which system dynamics in the practice setting contributed to the problem;

(13) whether the person is being disciplined for multiple violations of the NPA or its derivative rules and orders;

(14) the seriousness of the violation;

(15) the threat to public safety;

(16) evidence of good professional character as set forth and required by §213.27 of this chapter (relating to Good Professional Character); and

(17) any other matter that justice may require.

~~[(c) Unless otherwise specified, fines shall be payable in full by cashier's check or money order not later than the 45th day following the entry of an Order.]~~

(d) Each specific act or instance of conduct may be treated as a separate violation.

~~[(d) The payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and the Board's rules.]~~

(e) The Board may, upon the finding of a violation, enter an order imposing one or more of the following disciplinary actions, with or without probationary stipulations:

(1) Denial of the person's application for a license; license renewal; reinstatement of a revoked, suspended, or surrendered license; or temporary permit;

(2) Approval of the person's application for a license; license renewal; reinstatement of a revoked, suspended, or surrendered license; or temporary permit, with reasonable probationary stipulations as a condition of issuance, renewal, or reinstatement of the license or temporary permit. Additionally, the Board may determine, in accordance with §301.468 of the NPA, that an order denying a license application, license renewal, license reinstatement, or temporary permit be probated. Reasonable probationary stipulations may include, but are not limited to:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board as a condition for the issuance, renewal, or reinstatement of the license or temporary permit;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or periodic Board review;

(E) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(3) Issuance of a Warning. The issuance of a Warning shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or periodic Board review;

(E) practice for a specified period of at least one year under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(4) Issuance of a Reprimand. The issuance of a Reprimand shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or periodic Board review;

(E) practice for a specified period of at least two years under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(5) Limitation or restriction of the person's license, including limits on specific nursing activities or periodic Board review;

(6) Suspension of the person's license. The Board may determine that the order of suspension be enforced and active for a specific period and/or probated with reasonable probationary stipulations as a condition for lifting or staying the order of suspension. Reasonable probationary stipulations may include, but are not limited to, one or more of the following:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or periodic Board review;

(E) practice for a specified period of not less than two years under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(7) Remit payment of the administrative penalty, fine, or assessment of hearing costs;

(8) Acceptance of a Voluntary Surrender of a nurse's license(s);

(9) Revocation of the person's license;

(10) Require participation in remedial education course or courses prescribed by the Board which are designed to address those competency deficiencies identified by the Board;

(11) Assessment of a fine as set forth in §213.32 of this chapter (relating to Corrective Action Proceedings and Schedule of Administrative Fines);

(12) Assessment of costs as authorized by the Occupations Code §301.461 and the Government Code §2001.177; or

(13) Require successful completion of a Board approved peer assistance program.

[(e) When determining evidence of present fitness to practice, the Board or Executive Director may request an evaluation by a psychologist or psychiatrist, who is licensed by the Texas State Board of Examiners of Psychologists or the Texas Medical Board, respectively. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the psychological stability and veracity of the applicant or licensee. The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The applicant or licensee should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the individual a copy.]

(f) Every disciplinary order issued by the Board shall require the person subject to the order to participate in a program of education or counseling prescribed by the Board, which, at a minimum, will include a review course in nursing jurisprudence and ethics.

[(f) When determining evidence of present fitness to practice by a licensee or applicant for licensure:]

[(1) the Board or Executive Director may request an individual risk assessment conducted by a Board-approved forensic psychologist or psychiatrist who:]

[(A) evaluates the criminal history of a person; and]

[(B) seeks to predict:]

[(i) the likelihood that the person will engage in criminal activity that may result in the person receiving a second or subsequent reportable adjudication or conviction; and]

[(ii) the continuing danger, if any, that the person poses to the community.]

[(C) is familiar with the duties appropriate to the nursing profession.]

[(D) conducts the evaluation pursuant to professionally recognized standards and methods; and]

[(E) utilizes objective tests and instruments that, at a minimum, are designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the nurse applicant or licensee.]

[(2) The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board.]

[(3) The applicant or licensee should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the individual a copy.]

(g) The following disciplinary and eligibility sanction policies and guidelines shall be used by the Board and SOAH when determining the appropriate penalty/sanction in disciplinary and eligibility matters:

(1) Disciplinary Sanctions for Fraud, Theft, and Deception approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1646) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.

(2) Disciplinary Sanctions for Lying and Falsification approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1647) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.

(3) Disciplinary Sanctions for Sexual Misconduct approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1649) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.

(4) Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder and published on February 22, 2008 in the *Texas Register* (33 TexReg 1651) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.

(5) Disciplinary Guidelines for Criminal Conduct approved by the Board and published on March 9, 2007 in the *Texas Register* (32 TexReg 1409) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html.

[(g) In accordance with the provisions of the Texas Occupations Code and the Nursing Practice Act (NPA), and in keeping with the obligation to protect the consumer of nursing services from the unsafe, incompetent or unprofessional nurse, the Board of Nursing has adopted the following recommended guidelines for disciplinary orders and conditions of probation for violations of the NPA. The purpose of these guidelines is to give notice to licensees of the range of penalties which will normally be imposed upon violations of the provisions in Chapter 301, Subchapter J. The disciplinary guidelines are based upon a single count violation of each provision listed. Multiple violations of the same provision or rule, or other unrelated violations included in the administrative complaint, will be grounds for an enhancement of penalties subject to §301.4531(c)(1) and (2) of the NPA. All penalties at the upper range of the sanctions set forth in the guidelines, such as suspension, revocation, or surrender, include lesser penalties, i.e., fine, remedial education, or probation, which may also be included in the final penalty at the Board's discretion.]

[(1) In addition to subsection (a) of this section, the Board shall consider the following factors, as set forth in §301.4531(b) of the NPA, when determining the appropriate disciplinary action:]

[(A) whether the person is being disciplined for multiple violations of the NPA, or its derivative rules and orders;]

[(B) whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions;]

[(C) the seriousness of the violation;]

[(D) the threat to public safety; and]

[(E) any mitigating factors.]

[(2) The Board may, upon the finding of a violation, enter an order imposing one or more of the following disciplinary actions under the authority of §301.453(a) and (b) of the NPA:]

[(A) Denial of the person's application for a license, license renewal, or temporary permit;]

[(B) Approval of the person's application for a license, license renewal, reinstatement of a revoked, suspended, or surrendered license, or temporary permit; and set reasonable probationary stipulations as a condition of issuance, reinstatement, or renewal of the license or temporary permit. Additionally, the Board may determine, in accordance with §301.468 of the NPA, that an order denying a license application, license renewal, or temporary permit be probated. Reasonable probationary stipulations may include, but are not limited to:]

[(i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license;]

[(ii) submit to an evaluation as outlined in subsection (e) of this section;]

[(iii) participate in a program of education or counseling prescribed by the Board;]

[(iv) limit specific nursing activities and/or periodic board review;]

[(v) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board;]

[(vi) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or]

[(vii) perform public service which the Board considers appropriate;]

[(C) Issuance of a Warning. The issuance of a Warning shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:]

[(i) participate in a program of education or counseling prescribed by the Board;]

[(ii) practice for a specified period of at least one year under the direction of a registered nurse or vocational nurse designated by the Board;]

[(iii) perform public service which the Board considers appropriate;]

[(iv) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or]

[(v) limit specific nursing activities and/or periodic board review;]

[(D) Issuance of a Reprimand. The issuance of a Reprimand shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:]

[(i) participate in a program of education or counseling prescribed by the Board;]

[(ii) practice for a specified period of at least two years under the direction of a registered nurse or vocational nurse designated by the Board;]

[(iii) perform public service which the Board considers appropriate;]

[(iv) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or]

[(v) limit specific nursing activities and/or periodic board review.]

[(E) Limitation or restriction of the person's license, including limits on specific nursing activities or periodic board review:]

[(F) Suspension of the person's license. The Board may determine that the order of suspension be enforced and active for a specific period or probated with reasonable probationary stipulations as a condition for lifting or staying the order of suspension. Reasonable probationary stipulations may include, but are not limited to, one or more of the following:]

[(i) Limit the practice of the person to, or excluding, one or more specified activities of professional or vocational nursing;]

[(ii) submit to an evaluation as outlined in subsection (e) of this section;]

[(iii) submit to care, supervision, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license;]

[(iv) participate in a program of education or counseling prescribed by the Board;]

[(v) practice for a specified period of not less than two years under the direction of a registered nurse or vocational nurse designated by the Board;]

[(vi) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or]

[(vii) remit payment of the administrative penalty, fine, or assessment of hearing costs.]

[(G) Acceptance of a Voluntary Surrender of a nurse's license(s);]

[(H) Revocation of the person's license;]

[(I) Require participation in remedial education course or courses prescribed by the Board which are designed to address those competency deficiencies identified by the Board;]

[(J) Assessment of a fine;]

[(K) Assessment of costs as authorized by §301.461, Texas Occupation Code, and §2001.177, Texas Government Code; or]

[(L) Require successful completion of a Board approved peer assistance program.]

[(M) Every disciplinary order issued by the Board will require that the person subject to the order will participate in a program of education or counseling prescribed by the Board which at a minimum will include a review course in nursing jurisprudence and ethics.]

(h) To the extent that a conflict exists between the Disciplinary Matrix and a disciplinary and eligibility sanction policy described in subsection (g) of this section, the Disciplinary Matrix controls.

~~[(h) The following disciplinary and eligibility sanction policies and guidelines shall be used by the Executive Director, the State Office of Administrative Hearings (SOAH), when recommending a sanction; and the Board in determining the appropriate penalty/sanction in disciplinary and eligibility matters:]~~

~~[(1) Disciplinary Sanctions for Fraud, Theft and Deception approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1646) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.]~~

~~[(2) Disciplinary Sanctions for Lying and Falsification approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1647) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.]~~

~~[(3) Disciplinary Sanctions for Sexual Misconduct approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1649) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.]~~

~~[(4) Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder and published on February 22, 2008 in the *Texas Register* (33 TexReg 1651) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.]~~

~~[(5) Disciplinary Guidelines for Criminal Conduct approved by the Board and published on March 9, 2007 in the *Texas Register* (32 TexReg 1409) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html.]~~

(i) Unless otherwise specified, fines shall be payable in full by cashier's check or money order not later than the 45th day following the entry of an Order.

(j) The payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and the Board's rules.

(k) If the Board has probable cause to believe that a person is unable to practice nursing with reasonable skill and safety because of physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol, the Board may require an evaluation by a Board-approved addictionologist, addictionist, medical doctor, neurologist, doctor of osteopathy, psychologist, or psychiatrist, with credentials appropriate for the specific evaluation requested, as determined by the Board. In all cases, the evaluator must possess credentials, expertise, and experience appropriate for conducting the requested evaluation, as determined by the Board. The Board reserves the right to request a forensic component for any evaluation. In such cases, the evaluator must possess forensic credentials, expertise, and experience appropriate for conducting the requested forensic evaluation, as determined by the Board. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments, as determined and requested by the Board, which are designed to test the psychological stability, fitness to practice, professional character, and veracity of the person subject to evaluation. If applicable, the evaluation must include information regarding the person's prognosis and medication regime. The person subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The person subject to evaluation should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person a copy.

(l) When determining evidence of present fitness to practice because of known or reported unprofessional conduct, lack of good professional character, or prior criminal history:

(1) The Board may request an evaluation conducted by a Board-approved forensic psychologist or forensic psychiatrist who:

(A) evaluates the behavior in question or the prior criminal history of the person;

(B) seeks to predict:

(i) the likelihood that the person subject to evaluation will engage in the behavior in question or criminal activity again, which may result in the person committing a second or subsequent reportable violation or receiving a second or subsequent reportable adjudication or conviction; and

(ii) the continuing danger, if any, that the person poses to the community;

(C) is familiar with the duties appropriate to the nursing profession;

(D) conducts the evaluation pursuant to professionally recognized standards and methods; and

(E) utilizes objective tests and instruments, as determined and requested by the Board, that are designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the person subject to evaluation.

(2) The person subject to evaluation shall sign a release allowing the evaluator to review the file compiled by Board staff and a release that permits the evaluator to release the evaluation to the Board.

(3) The person subject to evaluation should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person a copy.

(4) The provisions of the Occupations Code §301.4521 apply to an evaluation requested under this subsection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905410
Jena R. Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 305-6822

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

The Texas Board of Veterinary Medical Examiners (Board) proposes amendments to §577.2, concerning Meetings, and

§577.12, concerning Directory of Licensees. The proposed amendments result from the Board's rule review of Chapter 577, conducted in accordance with Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register,* the Board contemporaneously proposes the rule review of Chapter 577.

The Board proposes the following changes to 22 TAC Chapter 577 that would clarify the rules regarding general administrative duties of the Board, including but not limited to meetings and the directory of licensees.

Language would be revised in §577.2 to conform the rule to the current practice of the Board and other state laws and rules regarding meetings conducted by the Board, including an agenda being posted, Roberts' Rules of Order governing the meetings, meetings being open to the public, consequences of disruptive behavior, the procedure for how meetings will be conducted with regards to members of the public and journalists. In addition, the proposed amendment addresses the procedure for the Board to follow with regards to executive sessions.

Language would be revised in §577.12 to show the Office of the Attorney General as correct agency promulgating the guidelines and rules on directories of licensees.

Dewey E. Helmcamp III, executive director, has determined that for each year of the first five years the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Mr. Helmcamp III has also determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of the proposed revisions would be ensuring that the general public is aware of the requirements and procedures for how meetings are conducted and the appropriate laws and rules governing meetings of the Board, as well as the correct agency that promulgates the guidelines and rules regarding directories of licensees. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

The Texas Board of Veterinary Medical Examiners invites comments on the proposal from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail vet.board@tbvme.state.tx.us. Comments will be accepted for 30 days following publication in the *Texas Register.*

SUBCHAPTER A. BOARD MEMBERS AND MEETINGS--DUTIES

22 TAC §577.2

The amendment is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

Texas Occupations Code, Chapter 801, is affected by this proposal.

§577.2. Meetings.

(a) The president shall preside at meetings of the Board. In his absence, the vice-president shall preside. In the absence of both the Board president and vice-president, the secretary shall preside.

(b) The Board shall hold a minimum of two regular meetings each year for the purpose of conducting Board business. Other meetings may be held on the call of the President or upon petition to the President of two or more Board members. The Board may hold meetings by telephone conference call or video conference call provided that the requirements of the Government Code, §551.125 and/or §551.127, are met.

(c) An agenda for each board meeting shall be posted in accordance with law and copies shall be sent to the board members.

(d) Board and committee meetings shall be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless the board by rule adopts a different procedure.

(e) Meetings of the board are open to the public unless such meetings are conducted in executive session pursuant to state law.

(f) In order that board meetings may be conducted safely, efficiently, and with decorum, attendees may not engage in disruptive activity that interferes with board proceedings.

(g) Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(h) Journalists have the same right of access to board meetings conducted in open session as other members of the public and are subject to the same requirements.

(i) The board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in disruptive activity that interferes with board proceedings.

(j) [~~(c)~~] Five members of the Board shall constitute a quorum and all members shall have a vote on all matters except where a Board member may be recused from voting for good cause. Decisions must be made by affirmative vote of five members.

(k) [~~(d)~~] Recording of meetings.

(1) A person may record all or part of the proceedings of a public Board meeting means of a tape recorder, video camera, or other means of audio or visual reproduction.

(2) In order to minimize disruption of the normal order of Board business, the executive director or Board president may direct any individual wishing to record or videotape the meeting as to equipment location, placement, and the manner in which the recording is conducted.

(l) Executive Session.

(1) The board may meet in executive session pursuant to law.

(2) An executive session of the board shall not be held unless a quorum of the board has first been convened in open meeting. If during such open meeting, a motion is passed by the board to hold an executive session, the presiding officer shall publicly announce that an executive session will be held.

(3) The presiding officer of the board shall announce the date and time at the beginning and end of the executive session.

(4) A certified agenda of the executive session shall be prepared.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905384
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 305-7563

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SUBCHAPTER B. STAFF

22 TAC §577.12

The amendment is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

Texas Occupations Code, Chapter 801, is affected by this proposal.

§577.12. Directory of Licensees.

Upon request the Board will furnish a complete or partial listing of currently licensed veterinarians in printed or electronic format. Costs for the directory will vary depending on the information requested and will be in accordance with the Office of the Attorney General 1 TAC §§70.1 - 70.11 (relating to Cost of Copies of Public Information) [~~General Services Commission guidelines and rules~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905385
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 305-7563

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER B. FAILURE TO ATTAIN FEE

30 TAC §§101.100 - 101.105, 101.107 - 101.109, 101.112, 101.114 - 101.122

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§101.100 - 101.105, 101.107 - 101.109, 101.112, and 101.114 - 101.122.

The proposed new sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 require each SIP for ozone nonattainment areas classified as severe or extreme to include a requirement for the imposition of a penalty fee for major stationary sources of volatile organic compounds (VOC) located in the area if the area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. The Houston-Galveston-Brazoria (HGB) area is classified as severe for both the one-hour ozone NAAQS and the 1997 eight-hour ozone NAAQS. The FCAA, §182(f) requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO_x). The fee is required to be paid for each calendar year after the attainment date until the area is redesignated as an attainment area for ozone. Additionally, the SIP must include procedures for the assessment and collection of the penalty fee.

As stated in FCAA, §185, the required penalty is $5,000 per ton, as adjusted by the consumer price index, of VOC or NO_x or both emitted in excess of 80% of the stationary source's baseline emissions (their baseline amount, as discussed elsewhere in this preamble). The source's baseline amount is proposed to be calculated as the lower of the baseline emissions or authorized emissions from the baseline year, 2007. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA impose and collect the fee.

A recent court ruling, *South Coast v. EPA,* 472 F.3d 882 (D.C. Cir. 2007), *decision clarified on reh'g by* 489 F.3d 1245 (D.C.Cir. 2007), *cert. denied by* 128 S.Ct. 1065 (U.S. 2008), vacated the EPA's Phase I ozone implementation rule that allowed areas to stay implementation of the penalty fee requirement for the one-hour ozone standard. Additionally, EPA is requiring such provisions be submitted for severe and extreme nonattainment area for the 1997 eight-hour ozone NAAQS. Future EPA rulemaking may specify how EPA interprets the applicability of the penalty fee requirement for future ozone standards. The EPA has been discussing with states possible flexibility options relating to the collection of a penalty fee but has issued no final guidance regarding these options. Given the lack of official guidance regarding applicability and implementation of the penalty fee requirement, the commission is proposing several flexibility options for comment and consideration at adoption.

The EPA has, however, described some basic principles for the applicability of the FCAA, §185 fee obligation applicability for severe ozone nonattainment areas. In a final rule published November 16, 2005, in the *Federal Register* (70 FedReg 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, the EPA noted in response to a comment that "Section 185 of the Act simply requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay 'a fee to the state as a penalty' for failure of that area to attain the ozone NAAQS by the area's attainment date. This penalty fee is based on the tons of volatile organic compounds or nitrogen oxides emitted above a source-specific trigger level during the 'attainment year.' It first comes due for emissions during the calendar year beginning after the attainment date and must be paid annually until the area is redesignated to attainment of the ozone NAAQS. . . . Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be assessed in calendar year 2006 for emissions that exceed 80% of

the source's 2005 baseline emissions." (See 70 FedReg 69440, 69441.)

The EPA goes on further to state that a "penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. However, the penalty fee does not ensure that any actual emissions reduction will ever occur, since every source can pay a penalty rather than achieve actual emissions reductions. The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of emissions reductions." (See 70 FedReg 69440, 69441-69442.)

The EPA issued guidance on March 21, 2008, regarding establishing emission baseline amounts. The March 21, 2008, guidance memo discusses alternative methods for calculating the baseline amount, as permitted by FCAA, §185. The EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions, because the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year. The EPA has indicated that relying on the EPA's regulations for Prevention of Significant Deterioration of Air Quality (PSD) found in 40 Code of Federal Regulations (CFR) §52.21(b)(48) would be an acceptable alternative method for calculating the baseline amount. Under the PSD rules, sources generally may use emissions data from any 24 consecutive month period within the last ten years (a 2-in-10 lookback period) to calculate their average annual actual emissions rate, referred to as baseline emissions in this proposed rule. The EPA determined the 2-in-10 lookback period to be reasonable because it allows sources to consider an average emissions rate for a full business cycle. The PSD rules modify this concept for electrical utility steam generating units to 24 consecutive months within the last five years (a 2-in-5 lookback period), due to a shorter business cycle for those units. The commission agrees that use of the 2-in-10 and 2-in-5 lookback periods are reasonable for sources whose emissions are irregular, cyclical, or otherwise vary significantly from year to year, and proposes to provide this flexibility in the same manner as provided for in the Texas new source review program.

The EPA used this March 21, 2008, memorandum in evaluating the San Joaquin Valley (SJV) §185 fee rule, as noted in its proposed limited approval and limited disapproval published August 19, 2009, in the *Federal Register* (74 FedReg 41826). In reviewing the SJV §185 fee rule, the EPA noted that there were several provisions that conflict with FCAA, §185 that prevent full approval of the submitted SIP revision, including: (1) a provision that exempts units that begin operation after the attainment year; (2) a provision that exempts a clean emissions unit as a unit that is equipped with an emissions control technology that either has a minimum 95% control efficiency (or 85% for lean-burn internal combustion engines), or meets the requirements for achieved-in-practice Best Achievable Control Technology during the five years immediately prior to the end of the attainment year; (3) a provision defining the baseline period as two consecutive years consisting of the attainment year and the year immediately prior to the attainment year; (4) a provision allowing averaging over two to five years to establish baseline emissions; and (5) a provision that defines "major source" by referring to a version of the definition that, although it correctly defines the major source threshold, is not SIP approved. The EPA noted specifically that with regard to issue number two noted above, SJV did not request that the EPA review this option for acceptability as an equivalent alternative under FCAA, §172(e), and did not provide a demonstration that the program it submitted would ensure that controls are "not less stringent" than those required under FCAA, §172(e). This notice provides some information regarding EPA's current thinking regarding the requirements of the §185 fee program, but is not final. The EPA also noted in the SJV proposal that "{t}he State must adopt and submit a rule to collect fees . . . from those units, or consistent with the Administrator's obligation under FCAA, §185(d), EPA will collect those fees." (See 74 FedReg 41826, 41828.)

One flexibility option the commission is proposing for comment is to allow major sources to aggregate either pollutants (VOC or NO_x) or sites (but not both) for purposes of determining their baseline amount and the penalty fee that applies to the major source. Because VOC and NO_x do not impact ozone formation equally, the approach used by some SIP revisions is to target those pollutants in a way that will provide the most effective attainment strategy. This targeting is a result of the knowledge gained from detailed modeling of the particular nonattainment area, and states are required by the FCAA to assess and develop strategies for nonattainment areas to achieve attainment and maintenance of the NAAQS. In some SIP revisions, including revisions for the HGB nonattainment area, targeted emission reductions of one pollutant in preference to the other is an effective way to reduce ozone formation. The commission's proposed flexibility option to allow aggregation of VOC and NO_x or site aggregation for either pollutant supports the approach used to reduce ozone formation in the HGB area by linking the control strategies for the HGB ozone nonattainment area to the baseline amount and penalty fee calculations. The targeted NO_x emissions reduction control strategy used for the one-hour ozone attainment demonstration for the HGB area was approved by the EPA. Certain major sources have been allowed, under specific rules adopted and approved as part of the HGB ozone nonattainment plan, to participate in airshed-specific cap and trade programs for VOC and NO_x as a part of a cost-effective approach to reducing ozone formation.

This proposal provides for restrictions for calculations of baseline amounts and fee obligations to remain consistent with VOC and NO_x aggregation allowed for SIP compliance in EPA-approved SIP revisions. Baseline amounts and aggregation methods, once established, will remain fixed throughout the applicability of the penalty fee obligation in order to maintain consistency and transparency for reductions of actual emissions over time, and to prevent gaming. If a major source chooses to combine VOC and NO_x at a site, it will not be allowed to further aggregate emissions across multiple sites. Major sources aggregating VOC across multiple sites for baseline amount consideration may not further aggregate VOC with NO_x at a particular site. This same principle applies for NO_x; aggregation of NO_x for a baseline amount across multiple sites will preclude combining NO_x with VOC at a specific site. A site opting to aggregate VOC with NO_x pollutants in calculating its baseline amount is also prohibited from using the Equivalent Alternative Obligation as defined in §101.121 provision of applying emissions banking and trading credits or allowances towards their Failure to Attain Fees as defined in §101.114.

Fee obligations are required to remain consistent with the baseline amount determination approach. Once a particular method for baseline amount calculation is chosen, the penalty fee calculation must remain consistent with that method, and will not be allowed to change. Therefore, if a major source has decided, based on its approach in meeting SIP requirements, to aggregate pollutants under one of the options of this subchapter as

the most appropriate choice for determining a baseline, all subsequent fee obligations will remain consistent with that choice.

A draft EPA memo, dated February 10, 2009, provided to the Clean Air Act Advisory committee for consideration by the Section 185 Work Group (available at *http://www.epa.gov/air/caaac/185.html)* allows states to propose alternative programs for reduction in ozone pollution, rather than imposing fees, if the alternative program achieves the same environmental benefit as imposing a fee program. The commission agrees that allowing this kind of flexibility would provide an equivalent or better environmental benefit, and would meet or exceed the requirements of the FCAA. As discussed further in this preamble, the commission is proposing to allow a reduction of the fee on a dollar for dollar basis by funding a supplement environmental project (if the project were not otherwise required). Additionally, the commission is proposing to allow a retirement of an emission reduction credit or cap and trade allowance on a ton per ton basis to reduce the amount of emissions at a site. This retirement is considered equivalent to other methods of reducing emissions to reduce fee obligation amount. However, since the EPA has not provided formal guidance or rules regarding alternative obligation programs under FCAA, §172(e) the commission requests comment regarding these flexibility options, and whether these flexibility options are equivalent alternatives under FCAA, §172(e). The commission proposes, and requests comment on, additional flexibility options for the application of FCAA, §185 fees, as discussed further in the SECTION BY SECTION portion of the preamble. Lastly, during the stakeholder process, some commenters raised concerns regarding whether it is appropriate (and legal) for the commission to adopt a rule that requires companies to pay a fee for emissions that occurred in the past (calendar year 2008). The commission solicits comment on the issue of whether it is more appropriate to adopt rule language that would require that the fee would be due only for emissions that occurred in full calendar years after the effective date of this rulemaking, e.g., calendar year 2011 and after.

SECTION BY SECTION DISCUSSION

§101.100, Definitions

Proposed new §101.100 contains definitions necessary for applying the rules. The terms defined include actual emissions, aggregated pollutant baseline amount, attainment date, attainment year, baseline amount, baseline emissions, electric utility steam generating unit, extension year, major stationary source, multiple site baseline amount, and regulated entity.

Actual emissions are proposed to be defined to include emissions from normal operations, and emissions associated with startups, shutdowns, maintenance (authorized or not otherwise authorized) and emissions from emissions events or other events not otherwise authorized and are reported annually to the commission for each calendar year.

The aggregated pollutant baseline amount would be proposed to be the sum of both VOC and NO_x baseline amounts for a single regulated entity. Both the baseline basis, whether allowable emissions or baseline emissions, and the year used for the determination must be the same.

Attainment date is proposed to be defined as the date an area was scheduled to be designated as having attained the ozone NAAQS in a SIP. The attainment year is proposed as the full calendar year that contains the attainment date. Extension year would be proposed to be defined as a year that meets the requirements of FCAA, §181(a)(5).

Baseline emissions is proposed to be defined to include emissions from normal operations, and emissions associated with startups, shutdowns, and maintenance, but excludes emissions from emissions events. Emissions events are excluded from the baseline amount calculations because they are not authorized and not representative of routine operations. For the purposes of this subchapter, baseline amount is the term referenced as "baseline amount" in the FCAA, §185 and in this subchapter, would be the lower of baseline emissions or authorized emissions at a site, as of the attainment year. If the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the average baseline emissions calculated from a consecutive 24-month historical period. Because the historical time period allowed by electrical utility steam generating units to determine an average based on 24 months differs from other types of emissions generating units, these units are specifically defined for this rule. The definition of electric utility steam generating unit is consistent with the definition used in 30 TAC §116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions. An emissions inventory is required for major sources per §101.10, relating to Emissions Inventory Requirements. Emissions reported in this report by regulated entities and recorded by the commission would be included in the basis for calculating fees and, if baseline emissions are used, included in the baseline amount.

The definition for major stationary source applicability definition used in the 30 TAC §122.10, General Definitions, for VOC or NO_x is proposed to be used.

Multiple site baseline amount is proposed to be defined as the sum of all VOC or NO_x baseline amounts from multiple sites. An aggregated pollutant baseline amount is proposed to be defined in this rule as the combining of VOC and NO_x baseline amounts at a site. This aggregation would be restricted in accordance with proposed §101.120. This aggregation would be restricted to sources participating in a local cap and trade program listed under the provisions of proposed §101.105.

A regulated entity is proposed as a major source for the pollutant exceeding the requirement in the section. The language is intended to define a regulated entity as a major source if it meets the requirement of either of the emissions thresholds listed. A major source may be major for only one or both pollutants.

§101.101, Applicability

The FCAA, §185 requires areas classified as severe or extreme to include a requirement for fees on VOC emissions in excess of 80% of a baseline amount for major sources located in an area failing to attain the standard. FCAA, §182(f), further requires that all SIP requirements applying to VOC also apply for sources of NO_x. This section identifies that the provisions of this subchapter apply to the HGB one-hour ozone nonattainment area, which failed to demonstrate attainment of the one-hour ozone standard by its attainment date. Additional language as proposed specifies future applicability for major stationary sources located in severe or extreme ozone nonattainment areas that fail to attain the ozone NAAQS by the area's attainment date.

§101.102, New Source Exemption

This section proposes that any major stationary source that was not in operation on or before the attainment date is exempt from the requirements of this subchapter. These sources did not con-

tribute emissions to a baseline amount for the nonattainment area for the attainment date. The FCAA, §185 relates to the area not making attainment as scheduled by the SIP revision. Sources not in operation by this date and not operating at any time in the nonattainment area prior to the attainment date were not part of the SIP revision and did not contribute to the area's emissions and nonattainment status. These sources have already offset their new emissions and installed equipment meeting the lowest achievable emission rates.

§101.103, Baseline Amount Calculation

The method for a one-time determination of baseline amount for each VOC or NO_x or both is outlined in this proposed section. A one-time baseline amount is determined for each pollutant for which the source qualifies as a major source. If the major stationary source is major for only one pollutant, the baseline amount estimate is required for just that pollutant. In subsection (a), the baseline amount is defined to mean the lower of annual, maintenance, start-up, and shutdown emissions reported on the emissions inventory during the attainment year or the emissions as allowed by the applicable Chapter 116 authorizations in effect for the site on the attainment date. Emissions inventory data are collected annually by the commission, and after a review process, are entered into the state's industrial emissions database. It is proposed that regulated entities are provided an opportunity to review, and if necessary, modify data submitted that year and for the immediately preceding year. Although it is recognized that emissions calculation factors occasionally change, the commission uses the data as represented in the emissions inventory as the emissions record for planning in SIP revisions. Because the data represents emissions for a reporting year as accurately as possible, and is relied upon in SIP revisions by the commission for air quality planning, revising historical emissions inventory emissions rates is not supported.

Exclusion of emissions events from the baseline amount is consistent with the fact the emissions are not authorized or representative of normal operations. If a major stationary source has less than one year of operation, it may not have a complete year of annual, maintenance, start-up, and shutdown emissions and thus will only have allowable information representing a year of operation for a baseline amount determination.

If the regulated entity has emissions that are irregular, cyclical, or otherwise vary significantly from year to year, an alternative method for determining emissions would be allowed using a historical perspective of annual, maintenance, start-up, and shutdown emissions as outlined in subsection (b). The FCAA, §185 does not address the period by which a historical period is defined. However, as discussed elsewhere in this preamble, the EPA has issued a March 21, 2008, guidance memo stating an acceptable alternative method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found in EPA's PSD, 40 CFR §52.21(b)(48).

For the purposes of this proposed subsection, the target is the attainment year, so the five (for electric generating units (EGU)) or ten (non-EGU) years immediately preceding the attainment date would be used as the window for the possible historical lookback period. The average consecutive 24-month period would be the basis for determining the baseline amount, in tons. All units at a site would be required to use the same 24-month period when calculating a baseline, but a separate 24-month period could be used for each pollutant. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions or authorized emissions to include emissions from an alternative method. Thus, the 24-month average amount must be lower than any total emissions authorization in effect on the attainment date.

When control or ownership changes for emission units during the attainment year, emissions from those emission units could be attributed to the regulated entity with control or ownership of the emission unit on December 31st of the attainment year.

The proposed rule would require the baseline amount calculation and supporting documentation are to be submitted to the agency on forms approved by the executive director. The baseline amount calculation would be subject to approval by the executive director.

The FCAA, §185 fee is required on emissions exceeding 80% of a baseline amount determined for the attainment year until the fee no longer applies for the area. A baseline amount is determined by each regulated entity that is a major source of VOC or NO_x or both based on representative emissions or authorized emissions. Thus, the baseline amount would be a fixed value and would not be changed without the approval of the executive director.

§101.104, Aggregated Pollutant Baseline Amount

This proposed section provides for the aggregation of both VOC and NO_x for a single site. The commission is proposing to allow aggregation of a site's VOC and NO_x baseline amount with certain restrictions that are consistent with EPA-approved SIP revisions.

If VOC and NO_x are aggregated at a single site, no other baseline amount aggregation, such as for sources under common control, would be allowed. The baseline amount would be calculated using the methodology in proposed §101.103, and the calculated baseline amount values for each pollutant are combined per this section. The baseline amount would be calculated using the same method for both pollutants. Because the pollutants are being combined into a single baseline, the proposed rule would require that the same period of time, and annual, maintenance, start-up, and shutdown emissions or authorized emissions basis be used to calculate the baseline amount for both pollutants. Regulated entities that choose to aggregate pollutants into a single baseline amount for a site would be prohibited from using the equivalent alternative obligation provision under proposed §101.120.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

§101.105, Multiple Site Aggregation Baseline Amount

This proposed section would provide for the aggregation of either VOC or NO_x (but not both) at multiple sites, to align fee obligations with the EPA approved attainment demonstration emissions reduction approach. The proposed rules would allow owners or operators of major stationary sources to aggregate baselines amounts of NO_x emissions from multiple sites if they are subject to Chapter 101, Subchapter H, Division 3 or to aggregate VOC emissions if they are subject to Chapter 101, Subchapter H, Division 6. This restriction limits the aggregation to the same regulated entities that are allowed to aggregate emissions for compliance under the applicable attainment demonstration SIP revision.

Baseline amounts are first calculated separately for each site for VOC or NO_x, or both, if the regulated entity is a major source of both pollutants, using the method outlined in proposed §101.103 prior to any baseline amount aggregation for multiple sites. This separate initial calculation of baseline amount is intended to provide transparency and consistency in baseline amount determinations with any subsequent aggregation.

The proposed rules would not allow owners or operators of major stationary sources to aggregate VOC and NO_x baseline amounts at a site and also aggregate across multiple major sources under common control. Owners or operators of major stationary sources opting to combine emissions from multiple major stationary sources under common control cannot further aggregate VOC and NO_x at a site as allowed under proposed §101.115. The aggregation methodology must be consistent throughout the baseline amount calculation and fee obligation calculation. Thus, the same period of time would be required as a basis for the baseline amount calculation for all aggregated sites under a pollutant. A separate 24-month period can be used for each pollutant.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

§101.107, Baseline Amount for Sources in Operation as a Minor Source on Attainment Date

This proposed section provides that regulated entities owning or operating stationary sources that were not major sources for either pollutant (VOC or NO_x) on the attainment date, that become major after the attainment date, would establish a baseline amount based on the first full year of operation as a major source for VOC or NO_x, or both. The baseline amount calculation would be determined separately for VOC and NO_x. The section would also require that a regulated entity report emissions to the commission to establish its baseline amount no later than May 31st following the first full year of operation as a major source. The baseline amount calculation would be subject to approval by the executive director, and would be fixed and not changed without approval of the executive director until the failure to attain fee no longer applies in the area.

Since the EPA has not provided final guidance or rules on the calculation of an appropriate baseline amount for sources that become major sources after the attainment date, the commission requests comment on this issue.

§101.108, Adjustment of Baseline Amount

The proposed new section would specify the limited circumstances in which baseline amounts may be adjusted. Regulated entities, as part of normal business, may transfer ownership of some or all of the equipment at a site to another regulated entity. The commission recognizes that a transfer of ownership could change the fee obligation of both regulated entities. This section would allow the transfer of the baseline amount and fee obligation associated with the equipment transferred. In a manner similar to transferring other obligations that do not change with ownership transfer, such as emissions authorizations, the commission is proposing to allow the affected regulated entities to transfer the baseline amount associated with each piece of equipment without change to the calculated baseline amount for the transferred equipment. The transfer would not impact the time period or amounts used for baseline amount on the remaining equipment at either regulated entity. These baseline amounts were calculated based on the operation of the equipment at the attainment date, or for emissions that are cyclic, irregular, or otherwise varying, for the period preceding the attainment date. The transfer of equipment does not change the historical operation of the equipment. In order to transfer baseline amount and the fee obligations, the owner or operator would be required to submit a request to the executive director and the executive director must approve the request.

The EPA has not provided formal guidance regarding the transfer of portions of a baseline amount from one major source to another when equipment ownership is transferred. The commission is soliciting specific comments on this issue.

§101.109, Adjustment of Baseline Amount for Sources With Less than 24 Months of Operation on Attainment Date

This proposed section would specify the limited circumstances in which baseline amounts may be adjusted for regulated entities that become major (or are newly authorized) after the attainment date. Regulated entities new to the nonattainment area may not have sufficient data at a site to determine if emissions at this site are irregular, cyclical, or otherwise vary significantly from year to year. The provisions of this section are intended to allow major sources with less than 24 months of continual operation by the attainment date some additional flexibility in establishing the emissions history at their site. If these emissions are considered irregular, cyclical, or otherwise varying significantly from year to year, a regulated entity could be allowed to request a modification to their baseline amount within 60 calendar days of completing 24 months of operation. The regulated entity may request the baseline amount be based on the average rate within the 24 months prior to the attainment date or the attainment year. The agency's use of a 24-month historical lookback period is shorter than the time allowed by the EPA under its rules for a cyclic determination, which provide for a 2-in-10 or 2-in-5 year lookback period.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble, the commission requests comment on this flexibility option.

§101.112, Failure to Attain Fee Obligation

This proposed section outlines the method used to determine the Failure to Attain Fee obligation for VOC or NO_x, or both. If the major stationary source is major for just one pollutant, the fee obligation would apply for just the one pollutant, VOC or NO_x. If the source is major for both VOC and NO_x, the fee obligation would apply for both pollutants. FCAA, §185 requires that the Failure to Attain Fee must be assessed on actual emissions, including emissions from emission events, starting the first year after the attainment year, on emissions exceeding 80% of the approved baseline amount. Inclusion of emissions events in the fee obligation is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the year that the fee is owed.

For example, the first fee for a major source of VOC would be calculated using the actual emissions from the year following the attainment date - the attainment year. If the nonattainment area's attainment date is in 2007, the first year's VOC fee obligation is calculated using actual emissions from the 2008 emissions inventory. For fee purposes, the baseline amount for VOC, as determined in §101.103, is multiplied by 80%. If actual emissions for 2008 exceed 80% of the baseline amount, a fee is owed on the amount of emissions that exceed 80% of the baseline

amount. The fee rate, as adjusted by the consumer price index, is multiplied by the emissions that exceed 80% of the baseline amount for the site. If the site is also a major source for NO_x, the fee obligation amount would be calculated for NO_x using the same method.

§101.114, Failure to Attain Fee Obligation for Aggregated Pollutant Baseline

This proposed section provides for calculation of the failure to attain fee obligation for regulated entities that opt to combine their baseline amounts for VOC and NO_x. The commission is proposing that regulated entities that aggregate pollutants would also be required to pay any fee obligation based on aggregating actual VOC and NO_x emissions. Regulated entities that have chosen to combine VOC and NO_x at their site would not be allowed to aggregate pollutants from multiple sites at a later date, even if the major source later reduces emissions and is no longer major for a pollutant. The commission proposes to maintain consistency from baseline amount to fee obligation determination with this approach.

This proposed section would require that actual emissions from both pollutants must be used in defining fee obligation. The fee would be assessed on the combined actual emissions of VOC and NO_x, starting the first year after the attainment year, in excess of 80% of the approved baseline amount. The baseline amount, calculated using the method outlined in proposed §101.104, is therefore, adjusted to 80% for the fee obligation. As required under the FCAA, §185, this adjusted baseline amount is subtracted from the sum of the actual emissions to estimate the emissions that exceed 80% of the aggregated baseline amount. The fee rate, as adjusted by the consumer price index, is multiplied by the emissions that exceed 80% of the aggregated baseline amount for the site.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble, the commission requests comment on this flexibility option.

§101.115, Failure to Attain Fee Obligation for Multiple Site Aggregation

This proposed section would provide for the calculation of the failure to attain fee for owners and operators of major sources in a nonattainment area that opt to aggregate either VOC or NO_x at multiple sites under common control. The proposed rule language would allow aggregation of emissions from either VOC or NO_x and subsequent fee obligation aggregation if the owners or operators of multiple sites operate under one of the two existing programs as required under §101.105(a) or (b). It is proposed that similar to the baseline amount determination, owners or operators of sources under common control that combined a single pollutant in a baseline amount calculation must aggregate actual emissions from the single pollutant. Aggregated VOC would not be combined with NO_x; aggregated NO_x would not be combined with VOC. The total fee shall be applicable to and calculated for each pollutant, VOC or NO_x, for which the regulated entity meets the requirements of §101.101. Fee obligation from VOC or NO_x emissions not qualified for baseline amount aggregation under §101.105 would remain separate and due from each site.

The commission proposes to maintain consistency between the baseline amount to fee obligation determination with this approach. The fee for a pollutant aggregated under multiple sites for a baseline amount would be calculated based on the aggregated actual emissions for all sites under common control minus 80% of the aggregated baseline amounts for all sites. For example, if multiple sites are combined for determining the NO_x baseline amount, the actual emissions for all of the same sites would be aggregated for those sites. The payment would be due based on the calculation for this aggregation. The baseline amount for VOC is considered separately for each of these sites. If any of these same sites do not have any aggregation for VOC, the calculation for VOC will be maintained at an individual site level. The fee obligation is due based on actual emissions minus 80% of the baseline amount for each individual site. Or, if some of these sites aggregate baseline amounts for VOC, the fee is due on the actual emissions for all the aggregated sites.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble, the commission requests comment on this flexibility option.

§101.116, Failure to Attain Fee Payment

This section proposes that payment of fees must be by check, certified check, electronic funds transfer, or money order made payable to the TCEQ, and sent to the TCEQ address printed on the billing statement within 30 calendar days of the invoice date. For the one-hour ozone standard in the HGB area, the first payment would be based on the first full calendar year actual emissions following the attainment year. For the HGB one-hour ozone nonattainment area, the attainment date was in 2007; the first payment would be due for calendar year 2008 emissions and thereafter until the Failure to Attain Fee no longer applies to the area. During the stakeholder process, some commenters raised concerns regarding whether it is appropriate (and legal) for the commission to adopt a rule that requires companies to pay a fee for emissions that occurred in the past (calendar year 2008). The commission solicits comment on the issue of whether it is more appropriate to adopt rule language that would require that the fee would be due only for emissions that occurred in full calendar years after the effective date of this rulemaking, e.g., calendar year 2011 and after. If adopted, the proposed rules state that the executive director can impose interest and penalties on owners or operators of major sources subject to the provisions of §101.100 that fail to make full payment of the fees when due.

The 30 calendar day invoice due period and other provisions in this chapter are consistent with invoices issued for other programs within the agency. Fees would be due on actual emissions that exceed 80% of the established emission baseline amount.

§101.117, Compliance Schedule

This proposed section would require the submission of baseline amount emissions on a form prescribed by the executive director. For the HGB one-hour ozone nonattainment area, major sources would be required to submit their baseline amount emissions to the executive director no later than 90 calendar days from the mail date the executive director sends the baseline amount notification. For areas where the fee may become applicable in the future, major sources would be required to submit their baseline amount emissions no later than 90 calendar days after the end of the attainment year for the area. It is proposed that owners or operators would be required to submit a report establishing baseline amount emissions to the executive director no later than May 31st following the first full year of operation as a major source. The fee payment is due no later than 30 calendar days after the invoice date.

The commission is soliciting specific comments on the provisions of this chapter regarding the time allowed for baseline amount determinations.

§101.118, Cessation of Program

The proposed new section would end the applicability of the fee upon either: 1) redesignation of the nonattainment area to attainment; 2) a finding of attainment by the EPA for the nonattainment area; or 3) submission to the EPA of three consecutive calendar years of quality assured ambient monitoring data demonstrating that the monitors did not exceed the NAAQS. The commission solicits comment on these three options for ending applicability of the fee.

§101.119, Exemption from Failure to Attain Fee Obligation

This section proposes that no FCAA, §185 fee payment is due for a year determined by the EPA to be an extension year under FCAA, §181(a)(5). The EPA may grant an extension year for a nonattainment area if all SIP obligations have been met and if one or fewer measured ozone exceedances occurred at any valid monitoring site in the nonattainment area in a year.

§101.120, Eligibility for Equivalent Alternative Obligation

This section proposes to allow regulated entities that owe a FCAA, §185 fee payment to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements of this subchapter. Additionally, the section provides that the entire fee obligation would be due for all regulated entities not meeting the requirements of §101.121 and §101.122. If an alternative obligation is not approved and funded, exercised, or otherwise completed by the fee due date, the payment of the fee would be due in full. The section also proposes that sites opting to aggregate VOC and NO_x under the provisions of §101.104(a) be prohibited from using the equivalent alternative obligation.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

§101.121, Equivalent Alternative Obligation

This section proposes to allow regulated entities to request to fulfill their fee obligation by relinquishing an equivalent portion of emission reduction credits, discrete emission reduction credits, current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances, or current or banked Mass Emissions Cap and Trade (MECT) program allowances.

The proposed rules would require that emissions credits and allowances submitted for fee reduction purposes must be consistent with the program policies. Emission credits submitted for fee reduction purposes, on a ton for ton basis, would only be allowed for use as an equivalent alternative for the pollutant specified on the credit. VOC credits would only be used as an alternative equivalent for VOC tons in excess of the baseline; NO_x credits would only be used as an alternative equivalent for NO_x tons in excess of the baseline. The use of allowances is similarly restricted, such that MECT allowances would only be used as an equivalent for NO_x tons in excess of the baseline amount. HECT allowances would only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for sites in Harris County. Significant digit rounding for equivalency would correspond to the respective emissions banking and trading program being used as an equivalent alternative. Removing these emissions, on a ton per ton basis, represented as allowances, furthers the goals of reducing ozone causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

§101.122, Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation

This section proposes to allow regulated entities to request to fulfill their fee obligation by contributing to a supplemental environmental project (SEP) on a pollutant specific basis, in either an amount equivalent to the tons on which the fee has been assessed or in an amount equivalent to the fee amount assessed. SEPs are projects that prevent or reduce pollution that exceeds existing regulatory requirements. Supporting a SEP guaranteeing reductions in the nonattainment area would provide cost effective opportunities more directly benefitting the air quality rather than imposition of a fee. Under this proposed rule, contributing to a SEP would reduce a source's fee obligation by a ton per ton basis or by a dollar per dollar basis by decreasing the fee obligation by the same amount.

The proposed rule language only allows funding for projects that have a direct benefit to the subject nonattainment area and exceed existing regulatory requirements. The SEP must directly benefit air quality and be in the nonattainment area for which the fee is due. These limitations restrict the SEPs to projects that offset the Failure to Attain Fee on a dollar per dollar or ton per ton basis without also offering regulated entities the ability to use the approved SEP as an alternative to paying all or a portion of a monetary penalty assessed for a violation of an environmental regulation. Additionally, the SEP may not be part of an agreement or enforceable order allowing the major stationary source to offset a portion of an imposed administrative penalty and not include projects that are necessary to bring the major stationary source into compliance with environmental laws. The SEP may not be used to offset a penalty or action or necessary to remediate environmental harm caused by a violation caused by the major stationary source. The established SEP program requires the participants to submit quarterly and annual project reports with expenditure and project completion information, providing validation of actual emissions reductions or expenditures. The payment to the SEP must be approved by the due date of the fee; therefore, any SEP used for payment of the fee obligation must be approved by the fee date.

Since the EPA has not provided final guidance or rules on the availability of alternative obligation programs under FCAA, §172(e), as discussed elsewhere in this preamble the commission requests comment on this flexibility option.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency in the form of increased revenue collections. Costs to the agency to implement the new fee provisions are not expected to be significant and would be offset by any increase in revenue subject to legislative appropriation. No fiscal implications are anticipated for other units of state government as a result of administration or enforcement of the proposed

rules. Local governments who own or operate major stationary sources of VOC or NO_x in ozone non-attainment areas classified as severe or extreme may be subject to the fee requirements in the proposed rule.

The proposed rules implement FCAA, §185. FCAA, §185 requires each SIP for ozone nonattainment areas classified as severe or extreme to include a penalty fee for major stationary sources of VOC located in the area if the area fails to attain the ozone NAAQS by the applicable attainment date. At this time, only the HGB severe ozone non-attainment area has not demonstrated attainment by the SIP date. The FCAA, §182(f) requires all SIP requirements for VOC to also apply for emissions of NO_x. The fee is imposed for each calendar year after the attainment date until the area is re-designated as an attainment area for ozone. The fee is $5,000 per ton as adjusted by the consumer price index on VOC or NO_x or both emitted in excess of 80% of a baseline. The baseline amount is based upon total baseline emissions or authorized emissions at a major source.

The proposed rules provide source applicability determination, emission baseline amount calculation methodology, determination of the required fee, and due dates for fee payment. Alternatives to a fee, allowed under the anti-backsliding provisions of FCAA, §172(e), will also be proposed.

As proposed, affected major stationary sources would need to submit a baseline amount determination on forms developed by the agency. The agency would then need to develop a process for reviewing and approving baseline amount determinations.

The agency would also need to develop a process for annually assessing and collecting the FCAA, §185 fee. The fee would be based on the annual emissions inventory and may be adjusted with alternative obligations. The agency would also assess and verify the appropriateness of SEPs and the retirement of credits as equivalent options to the FCAA, §185 fee program requirements.

A database would track baseline amounts, fees, and obligations.

It is anticipated that during the first year the rules are in effect, the agency would establish and approve the baseline amount for each affected major source. Fee assessment would commence once the baseline amount has been established for each major source. Database development would begin during the first year the rules are in effect and continue for up to two years, depending upon available staff and funding. The agency would use current appropriations to implement the fee program.

The FCAA, §185 fee is expected to result in additional fee revenue deposited into the Clean Air Account 151. Estimated fee revenue collections are very difficult to project without knowing the baseline amount determination for each affected site. In addition, emissions reductions since the baseline year will have to be taken into consideration as well as the method of baseline amount determination selected by each site.

Even though baseline amount determinations have not been made, staff has attempted to provide potential fiscal implications of the proposed fee by providing a potential range of revenue based upon the 2007 emissions inventory and historical data trends. The proposed rules provide that the fee can be calculated using a baseline amount for VOC or NO_x, or both. In addition, the fee can be calculated using VOC and NO_x emissions combined for multiple sites. The essential calculation of the fee is as follows.

VOC Fee =$5,000*(CPI/122.15)*(VOCActual-0.8*VOC Baseline Amount)

NO_x Fee = $5,000*(CPI/122.15)*($NO_x$ Actual-0.8*NO_x Baseline Amount)

The Consumer Price Index (CPI) is defined as the annual CPI adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31st of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with FCAA, §502(b)(3)(B)(v) and §185(b)(3). Using the 2007 CPI adjustment factor, staff have estimated the 2008 fee at $8,126 per pollutant ton.

For the estimated 300 to 400 major sources that may be affected by the proposed rules, staff is not able to determine an average number of tons of pollutants over the baseline amount for all of the sources. However, based upon the most recent emissions inventory, there are an estimated 219 major sources that are projected to average approximately 31.2 tons per year in VOC over the baseline amount. At $8,126 per ton, fee revenue could total $55,523,332 annually for these sites. There are an estimated 141 sites that average 60 tons per year over the baseline amount for NO_x. At $8,126 per ton, fee revenue could total $68,745,960 annually for these sites. Total annual revenue would be roughly $124,269,292. However, in order to take into account those sites with irregular or cyclical emissions, as well as those sites that are not over the baseline amount or have emissions lower than the sites mentioned above, the estimate for the average number of tons of pollutants over the baseline amount was lowered to 25 tons for both VOC and NO_x. If 219 sites average 25 tons over the baseline amount for VOC, revenue would be estimated at $44,489,850. If 141 sites average 25 tons over the baseline amount for NO_x, revenue would be estimated at $28,644,150. Total annual revenue using an average of 25 tons of pollutants over the baseline amount would be $73,134,000. Depending upon the average number of tons of pollutants over the baseline, revenue could be between $73,134,000 and $124,269,292.

Any major source operated by a local government that exists in a severe or extreme ozone nonattainment area that did not demonstrate attainment would be subject to these rules. At this time, only the HGB severe ozone nonattainment area has not demonstrated attainment by the SIP date. Sources such as boilers at universities, sewerage facilities, landfills, and government research facilities are listed as major sources in the HGB nonattainment area and may be affected by the proposed rules.

At this time, only one site in the HGB area, a sewerage operated by a local government, has 2007 emissions greater than the applicability threshold defined by the Failure to Attain Fee rule. If other governmental entities increase emissions and become a major emitter of VOC or NO_x, they too would be subject to the rule. Depending upon final baseline amount determinations, emissions reductions since the baseline year, as well as the method of baseline amount determination selected by the site, the sewerage may pay an annual fee of as much as $203,150 assuming the average amount of emissions per site over a baseline amount of 25 tons.

PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be further reductions of ozone causing emissions in nonattainment areas.

It is estimated that there are 300 to 400 major sources of VOC or NO_x or both in the HGB nonattainment area that would be affected by the proposed rules. These sources represent all of the industrial source categories in the area including electric generating utilities. It is not possible to predict what business decision would be made by individual companies in order to meet the fee obligation, but it can be assumed that some of these sources would be subject to the FCAA, §185 fee. Because baseline amounts and reductions in emissions between the attainment year and the years following are not known, the potential impacts to specific companies and consumers are not known.

Any major source of VOC or NO_x, or both, is subject to the fee. The major source would calculate a one-time baseline amount level and annually pay fees based on actual emissions in excess of 80% of the baseline. Estimated fees paid by major sources are very difficult to project without the baseline amount determinations. In addition, emissions reductions since the baseline year will affect the determination as well as the method of baseline amount determination selected by each site.

Even though baseline amount determinations have not been made, staff has attempted to provide potential fiscal implications of the proposed fee by providing a potential range of fees based upon the 2007 emissions inventory and historical data trends. For the estimated 300 to 400 major sources that may be affected by the proposed rules, staff is not able to determine an average number of tons of pollutants over the baseline amount for all of the sources. However, based upon the most recent emissions inventory, there are an estimated 219 major sources that will average approximately 31.2 tons per year in VOC over the baseline amount. At $8,126 per ton, annual fees for each site would be $253,532. There are an estimated 141 sites that average 60 tons per year over the baseline amount for NO_x. At $8,126 per ton, annual fees for each site would be $487,560.

However, in order to take into account those sites with irregular or cyclical emissions, as well as those sites that are not over the baseline amount or have emissions lower than the sites mentioned above, the estimate for the average number of tons of pollutants over the baseline amount was lowered to 25 tons for both VOC and NO_x. For 219 sites that average 25 tons over the baseline amount for VOC, annual fees would be $203,150 per site. For 141 sites that average 25 tons over the baseline amount for NO_x, fees for each site would also be estimated at $203,150. Total annual fees for sites in the HGB area could be between $73,134,000 and $124,269,292.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. No small businesses are listed as a major source of emissions in the State of Texas Air Reporting System database and the major sources of emissions subject to the rules have indicated on their annual emissions inventory statement that they are not small businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are a component of the state's plan to protect the environment and reduce risks to human health from environmental exposure to air pollutants, and the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules are intended to enable Texas to comply with the requirements of the FCAA, §185 for the HGB one-hour ozone nonattainment area, and any future ozone nonattainment areas classified as severe or extreme. Fees are required to be collected under the FCAA, §185, for all major sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may also collect interest). The applicability of the fee may have a benefit in reducing emissions of ozone precursors in ozone nonattainment areas, by incentivizing sources to further reduce emissions, but the proposed rules will not require emission reductions; and appear to have been designed primarily as a penalty for failure to attain the ozone standard. Specifically, the proposed rulemaking would require that all major sources of VOC or NO_x or both in the HGB ozone nonattainment area (or any future ozone nonattainment area classified as severe or extreme) pay fees on emissions emitted in excess of 80% of the source's baseline amount.

The proposed rulemaking would implement requirements of the FCAA. Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS

in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under the FCAA, that must be included in their SIPs, such as the requirement of FCAA, §185, in order to avoid SIP disapproval or sanctions under the FCAA. The proposed rules would incorporate requirements to fulfill the requirements of FCAA, §185.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule is a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states have flexibility to develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. This proposed rulemaking will have no impact beyond the impact that is required by the FCAA, §185. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the Texas Legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the Legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The Legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rulemaking does not exceed a standard set by federal law nor exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Finally, this proposed rulemaking was not developed solely under the general powers of the agency but is also authorized by TCAA, §382.012. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet the definition of a "major environmental rule." Additionally, even if the rulemaking did meet the definition of a "major environmental rule" it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to implement the FCAA, §185 fee requirement in the HGB ozone nonattainment area, and in future severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. Texas Govern-

ment Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Fees are required to be collected under the FCAA, §185, for all major sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may also collect interest). The proposed rules will enable Texas to comply with the requirements of the FCAA, §185 for the HGB ozone nonattainment area, and any future ozone nonattainment areas classified as severe or extreme. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter B is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed new sections to Chapter 101, Subchapter B are adopted, owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 101, Subchapter B requirements.

ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal in Austin on January 5, 2010, at 2:00 p.m. in the TCEQ Campus, Building E, Room 201S, at 12100 Park 35 Circle. A second hearing will be held in Houston on January 6, 2010, at 2:00 p.m. in the Houston-Galveston Area Council at 3555 Timmons, Room A. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Texas Register Team at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-009-101-EN. The comment period closes January 11, 2010. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Kathy Pendleton, Emissions Assessment Section, at (512) 239-1936.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; TWC, §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7511a(d)(3), (e), and (f), regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d, regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

The proposed new sections implement the requirements of THSC, §§382.002, 382.011, 382.012, and 382.017; TWC, §§5.701 - 5.703, 5.705, and 5.706; and FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d.

§101.100. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

(1) Actual Emissions--The actual emissions must include all quantifiable emissions reported in the annual emissions inventory, including emissions from normal operations, emissions associated with startups, shutdowns, maintenance, and emissions events, and other events not otherwise authorized.

(2) Aggregated Pollutant Baseline Amount--The summation of volatile organic compounds and nitrogen oxides emissions for calculating a baseline amount for a single regulated entity per §101.104 of this title (relating to Aggregated Pollutant Baseline Amount), using a common year or period of operation and common ownership of authorized emissions or baseline emissions.

(3) Attainment Date--The date an area is scheduled to attain the National Ambient Air Quality Standard for ozone, as documented in the state implementation plan.

(4) Attainment Year--For the one-hour ozone standard, the attainment year is calendar year 2007. For the 1997 eight-hour ozone standard, the attainment year is the calendar year immediately following an ozone nonattainment area's attainment date.

(5) Baseline Amount--Tons of volatile organic compounds or nitrogen oxides emissions calculated separately at a site, using data submitted to and recorded by the commission, per §101.103 of this title (relating to Baseline Amount Calculation).

(6) Baseline Emissions--The baseline emissions rate must be the emissions reported in tons in the annual emissions inventory update submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title (relating to Emissions Inventory Requirements). The baseline emissions must include emissions associated with normal operations, startups, shutdowns, and maintenance activities (regardless of whether they are authorized) and excludes emissions from emissions events reported per the requirements of §101.10 of this title.

(7) Electric Utility Steam Generating Unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(8) Extension Year--A year as defined in Federal Clean Air Act, §181(a)(5).

(9) Major Stationary Source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant, including volatile organic compounds (VOC) and nitrogen oxides (NO_x) for which a National Ambient Air Quality Standard has been issued. The major source thresholds are for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1), effective June 19, 1977. For purposes of this subchapter, an affected regulated entity is one that meets any one of the following conditions:

(A) For sources in a severe ozone nonattainment area that has failed to demonstrate attainment, the regulated entity has the potential to emit, at maximum operation or design capacity, 25 tons per year (tpy) or more of VOC or NO_x or both; or

(B) For sources in an extreme ozone nonattainment area that has failed to demonstrate attainment, the regulated entity has the potential to emit, at maximum operation or design capacity, ten tpy or more of VOC or of NO_x or both.

(10) Multiple Site Baseline Amount--A summation of volatile organic compounds baseline amounts or a summation of nitrogen oxides baseline amounts from multiple sites per §101.105 of this title (relating to Multiple Site Aggregation Baseline Amount).

(11) Site--The total of all stationary sources located on one or more contiguous or adjacent properties, that are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility will be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the *Standard Industrial Classification Manual*, 1987) or the research and development operation is a support facility for the manufacturing facility.

§101.101. Applicability.

The provisions of this subchapter apply to all regulated entities that are major stationary sources of volatile organic compounds or nitrogen oxides that are located in a severe or extreme nonattainment area that has failed to attain the National Ambient Air Quality Standard for ozone by the applicable attainment date.

§101.102. New Source Exemption.

Any major stationary source meeting the applicability requirements of §101.101 of this title (relating to Applicability) that was not in operation on or before the attainment date is exempt from the requirements of this subchapter.

§101.103. Baseline Amount Calculation.

(a) For purposes of this subchapter, the baseline amount must be computed as the lower of the following:

(1) total amount of baseline emissions in the attainment year;

(2) total emissions allowed under authorizations, including emissions from maintenance, shutdown and startup activities, applicable to the source in the attainment year; or

(3) total average baseline emissions as calculated under subsection (b) of this section.

(b) If the regulated entity's emissions are irregular, cyclical, or otherwise vary significant from year to year, then the baseline amount may be computed using any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute an average baseline emissions rate (tons per year) for the site. If used, the historical period must be:

(1) ten years for non-utilities; or

(2) five years for electrical utility steam generating units.

(c) When control or ownership of emission units changes during the baseline year, the emissions from those emission units will be attributed to the regulated entity with control or ownership of the emission unit on December 31st of the attainment year.

(d) A baseline amount, reported in units of tons, must be calculated separately for volatile organic compounds and for nitrogen oxides. The calculation must be made for each pollutant for which the source meets the major source applicability requirements of §101.101 of this title (relating to Applicability).

(e) The baseline amount calculation is subject to approval by the executive director. The baseline amount will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area.

§101.104. Aggregated Pollutant Baseline Amount.

(a) Aggregation of Pollutants. Notwithstanding the requirements of §101.103 of this title (relating to Baseline Amount Calculation), a regulated entity that is a major stationary source of emissions meeting the applicability requirements of §101.101 of this title (relating to Applicability) may choose to combine emissions for both volatile organic compounds (VOC) and nitrogen oxides (NO_x) into a single aggregated pollutant baseline amount for a site after calculating each pollutant's emission baseline amount in accordance with this subchapter. Both pollutants must have:

(1) the same time period for calculating the baseline amount; and

(2) the same basis of either baseline or authorized emissions to calculate the baseline amount.

(b) Failure to Attain Fee Obligation Requirement. If a major stationary source elects to aggregate pollutants in accordance with this section, then the owner and/or operator of the major stationary source shall also aggregate pollutants to calculate the Failure to Attain Fee in accordance with §101.114 of this title (relating to Failure to Attain Fee Obligation for Aggregated Pollutant Baseline).

(c) Exclusion from Aggregating Emissions from Multiple Sites. The owner and/or operator of a regulated entity that is a major stationary source choosing to combine emissions for both VOC and NO_x into a single baseline amount for a site shall not aggregate emissions from multiple sites as allowed under §101.105 of this title (relating to Multiple Site Aggregation Baseline Amount).

(d) Exclusion from Aggregating Ozone Precursor Pollutants. The owner and/or operator of a regulated entity that is a major stationary source choosing to combine emissions for both VOC and NO_x into a single baseline amount for a site is prohibited from using the Equivalent Alternative Obligation provision under §101.120 of this title (relating to Eligibility for Equivalent Alternative Obligation).

(e) Approval. The aggregated baseline amount calculation is subject to approval by the executive director. The aggregated baseline amount will be fixed and not be changed without the approval of the executive director, until the Failure to Attain Fee no longer applies for the area.

§101.105. Multiple Site Aggregation Baseline Amount.

(a) Aggregation of nitrogen oxides (NO_x). Notwithstanding the requirements of §101.103 of this title (relating to Baseline Amount Calculation), the owner and/or operator of major stationary sources meeting the applicability requirements of §101.101 of this title (relating to Applicability), that are subject to Subchapter H, Division 3 of this chapter (relating to Mass Emissions Cap and Trade Program) may choose to aggregate NO_x baseline emissions from multiple sites to calculate the multiple site baseline amount.

(b) Aggregation of volatile organic compounds (VOC). Notwithstanding the requirements of §101.103 of this title, the owner and/or operator of major stationary sources meeting the applicability requirements of §101.101 of this title, that are subject to Subchapter H, Division 6 of this chapter (relating to Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program) may aggregate VOC baseline emissions from multiple sites to calculate the multiple site baseline amount.

(c) Failure to Attain Fee obligation requirement. If the owner and/or operator of a regulated entity that is a major stationary source elects to aggregate emissions from multiple sites in accordance with this section, then the owner and/or operator of a regulated entity shall also aggregate emissions from multiple sites to calculate the Failure to Attain Fee in accordance with §101.115 of this title (relating to Failure to Attain Fee Obligation for Multiple Site Aggregation).

(d) Exclusion from Aggregating VOC with NO_x. If the owner and/or operator of regulated entity that is a major stationary source elects to aggregate baseline emissions from multiple sites as allowed in this section, then the owner and/or operator of a regulated entity may not also elect to aggregate pollutants as allowed under §101.104 of this title (relating to Aggregated Pollutant Baseline Amount).

(e) Use of VOC and NO_x in Equivalent Obligation. The equivalent obligation amount shall be specific for NO_x or VOC and not allow aggregation of these compounds when using an EPA-approved local cap and trade program.

(f) Approval. The multiple site aggregation baseline amount calculation is subject to approval by the executive director. The multiple site aggregation baseline amount will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies for the area.

§101.107. Baseline Amount for Sources in Operation as a Minor Source on Attainment Date.

(a) Minor sources at the attainment date. Owner and/or operators of regulated entities that are major stationary sources that did not meet the requirements of §101.101 of this title (relating to Applicability) on the attainment date will calculate a baseline amount for volatile organic compounds (VOC) or nitrogen oxides (NO_x) or both. For purposes of this subchapter, the baseline amount must be computed as the lower of either of the following:

(1) total amount of baseline emissions in the first full calendar year of operation as a major source after the attainment date; or

(2) total emissions allowed under authorizations applicable to the source in the first full calendar year of operation as a major source after the attainment date.

(b) Calculation. A baseline amount, reported in units of tons, must be calculated separately for VOC and for NO_x. The calculation must be made for each pollutant for which the source meets the major source applicability requirements of §101.101 of this title.

(c) Approval. The baseline amount calculation is subject to approval by the executive director. Baseline amounts will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area.

§101.108. Adjustment of Baseline Amount.

(a) Owner and/or operators of regulated entities may request adjustment of their baseline amount if ownership and operation of equipment has been transferred to another regulated entity. Adjustments to the baseline amount are limited as follows:

(1) The baseline amount, as calculated and reported for all equipment being transferred, will be transferred from the original reporting regulated entity to the new regulated entity without modification to the reported amount; and

(2) Baseline amounts for remaining equipment at a regulated entity will not be adjusted based on a change of ownership of equipment to or from a regulated entity.

(b) Within 90 calendar days of the effective date of ownership transfer of equipment, the owner or operator of each regulated entity affected by the transfer of equipment in an area meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report establishing its adjustment of a baseline amount on a form published by the executive director.

(c) The baseline amount adjustment calculation is subject to approval by the executive director. After approval, it will be fixed and

not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies to the area.

§101.109. Adjustment of Baseline Amount for Sources With Less than 24 Months of Operation on Attainment Date.

(a) Applicability. The baseline amount may be adjusted for regulated entities meeting the applicability in §101.101 of this title (relating to Applicability) if the regulated entity experienced less than 24 months of consecutive operation by the area's attainment date. The adjusted baseline amount must be computed as the lower of the following:

(1) amount of baseline emissions in the attainment year; or

(2) emissions allowed under authorizations applicable to the source in the attainment year.

(b) Baseline Amount Reporting. Within 60 calendar days of completing 24 months of operation, the owner or operator of each regulated entity in an area meeting the requirements of §101.101 of this title shall submit to the executive director a report establishing its adjusted baseline amount on a form published by the executive director.

(c) Approval. The adjusted baseline amount calculation is subject to approval by the executive director. Baseline amounts will be fixed and not be changed without the approval of the executive director until the Failure to Attain Fee no longer applies for the area.

§101.112. Failure to Attain Fee Obligation.

(a) Pollutant Applicability. The total fee will be applicable to and calculated independently for each pollutant for which the regulated entity meets the requirements of §101.101 of this title (relating to Applicability):

(1) volatile organic compounds (VOC); and

(2) nitrogen oxides (NO_x).

(b) Obligation. The owner and/or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (c) of this section. Payment of all fees must be paid in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on the first full calendar year following the attainment year on actual emissions exceeding 80% of the pollutant baseline amount. The fee is due every year thereafter, until the Failure to Attain Fee no longer applies to the area.

(c) Calculation. For the VOC fee, VOC emissions will be used for both the actual and the baseline amount. For the NO_x fee, NO_x emissions will be used for both the actual and the baseline amount. The fee will be calculated separately for VOC or NO_x by:
Figure: 30 TAC §101.112(c)

§101.114. Failure to Attain Fee Obligation for Aggregated Pollutant Baseline.

(a) Pollutant Applicability. The fee will be applicable to both pollutants, volatile organic compounds (VOC) and nitrogen oxides (NO_x), as combined, emitted from a major stationary source meeting the requirements of §101.101 of this title (relating to Applicability), that chooses to aggregate VOC and NO_x as allowed under §101.104 of this title (relating to Aggregated Pollutant Baseline Amount).

(b) Obligation. The owner or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (c) of this section. Payment of all fees must be in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on the first full calendar year following the attainment year on actual emissions exceeding 80% of the aggregated pollutant baseline amount. The fee is due every year thereafter, until the Failure to Attain Fee no longer applies to the area.

(c) Calculation of fee. For the VOC fee, VOC emissions will be used for both the actual and baseline amount. For the NO_x fee, NO_x emissions will be used for both the actual and the baseline amount. The fee will be calculated as follows.
Figure: 30 TAC §101.114(c)

§101.115. Failure to Attain Fee Obligation for Multiple Site Aggregation.

(a) Pollutant Applicability. The total fee must be applicable to and calculated for each pollutant, volatile organic compounds (VOC) or nitrogen oxides (NO_x), for which the regulated entity meets the requirements of §101.101 of this title (relating to Applicability). Actual VOC or NO_x emissions may be aggregated for multiple sites and limited to emissions from:

(1) Regulated entities allowed to aggregate NO_x per §101.105(a) of this title (relating to Multiple Site Aggregation Baseline Amount); or

(2) Regulated entities allowed to aggregate VOC per §101.105(b) of this title.

(b) Separate Pollutant Obligation. Fee obligation from VOC or NO_x emission sources not qualified for baseline aggregation under §101.105 of this title will remain separate and due from each regulated entity. The fee will be calculated by the method described in §101.112 of this title (relating to Failure to Attain Fee Obligation).

(c) Obligation. The owner or operator of each regulated entity to which this rule applies shall pay a fee to the commission, computed in accordance with subsection (d) of this section. Payment of all fees shall must be paid in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on the first full calendar year following the attainment year on actual emissions exceeding 80% of the aggregated pollutant baseline amount. The fee is due every year thereafter, until the Failure to Attain Fee no longer applies to the area.

(d) Calculation of fee for emissions from aggregated sites. The owner and/or operator of a regulated entity will calculate the fee separately for each pollutant, VOC or NO_x, aggregated across multiple sites. If VOC are aggregated per §101.105 of this title, VOC emissions must be used for aggregated actual emissions and the aggregated baseline emissions. If NO_x are aggregated per §101.105(b) of this title, NO_x emissions must be used for the aggregated actual and aggregated baseline emissions. The fee will be calculated for VOC or NO_x as follows.
Figure: 30 TAC §101.115(d)

§101.116. Failure to Attain Fee Payment.

(a) Payment. Payment of fees required by this subchapter must be paid by check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ), and sent to the TCEQ address printed on the billing statement.

(b) When Failure to Attain Fee begins. The first payment of the fee is due and calculated for actual emissions from the first full calendar year following the attainment year.

(c) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subchapter. Failure to pay the full emissions fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178. The provisions of TWC, §7.178, as first adopted and amended thereafter, are and will remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

(d) Late payments. The agency shall impose interest and penalties on owners or operators of accounts who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.117. Compliance Schedule.

(a) Baseline Amount Determination. The owner or operator of each regulated entity meeting the requirements of §101.101 of this title (relating to Applicability) will submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director.

(1) Houston-Galveston-Brazoria one-hour nonattainment area. The Baseline Amount Determination forms are due no later than 90 calendar days from the mail date the agency sends the Baseline Amount notification.

(2) Future Areas that fail to attain. The Baseline Amount Determination forms are due to the executive director no later than 90 calendar days after the end of attainment year for the area.

(b) New Major Source Baseline Amount Reporting. No later than May 31st following the first full year of operation as a major source, the owner and/or operator of a regulated entity meeting the requirements of §101.101 of this title will submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director.

(c) Payment Due Date. The fee payment is due no later than 30 calendar days after the invoice date. If an account commences or resumes operation during the fiscal year in which the fee is assessed, the full emissions fee payment will be due prior to commencement or resumption of operations.

§101.118. Cessation of Program.

The Failure to Attain Fee will continue to apply until one of the following actions is final:

(1) redesignation of the nonattainment area by the United States Environmental Protection Agency (EPA) to attainment;

(2) finding of attainment by the EPA; or

(3) three consecutive calendar years of certified monitoring data submitted to the EPA demonstrating that the monitors did not exceed the National Ambient Air Quality Standards.

§101.119. Exemption from Failure to Attain Fee Obligation.

No owner and/or operator of a regulated entity that is a major stationary source shall be required to pay a fee during any year that has been determined by the United States Environmental Protection Agency to be an extension year under Federal Clean Air Act, §181(a)(5).

§101.120. Eligibility for Equivalent Alternative Obligation.

(a) Alternative option. Notwithstanding any requirement in this subchapter, the owner and/or operator of regulated entities that are major sources obligated to pay a Failure to Attain Fee may submit a request to the executive director to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements in accordance with §101.121 and §101.122 of this title (relating to Equivalent Alternative Obligation and Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation).

(b) Partially met fee obligation. Use of an equivalent alternative obligation to partially meet a fee obligation for a singe pollutant or for an obligation based on aggregated pollutants or sites is not allowed.

(c) Obligation. The entire fee obligation is due in accordance with §101.117 of this title (relating to Compliance Schedule) for all regulated entities not meeting the requirements of §101.121 and §101.122 of this title.

(d) Notification Requirements. Upon receipt of notification from the executive director regarding the Failure to Attain Fee obligation calculated in accordance with §§101.112, 101.114, or 101.115 of this title (relating to Failure to Attain Fee Obligation, Failure to Attain Fee Obligation for Aggregated Pollutant Baseline, and Failure to Attain Fee Obligation for Multiple Site Aggregation), an owner and/or operator of a regulated entity shall inform the executive director of their selection for the payment.

(1) The owner and/or operator of a regulated entity must inform the executive director if they are selecting an equivalent alternative obligation using forms approved by the executive director.

(2) The owner and/or operator of a regulated entity must submit a form selecting their equivalent alternative obligation.

(3) The form must be received by the executive director no later than 60 calendar days from the mail date the fee obligation notification was sent to the regulated entity.

(4) All equivalent alternative obligations must be approved and funded, exercised, or otherwise completed by no later than 60 calendar days from the mail date the notification was sent to the regulated entity.

(5) If the executive director does not receive notification of a selection of equivalent alternative obligation and the equivalent alternative obligation is not approved and funded, exercised, or otherwise completed, the fee payment will be due in full per the provisions of §101.116 of this title (relating to Failure to Attain Fee Payment).

(e) Restriction for Sites with Aggregated Pollutant Baseline Amount. Owners/operators of sites opting to aggregate ozone precursor pollutants in calculating their emissions baseline amount under the provisions of §101.104(a) of this title (relating to Aggregated Pollutant Baseline Amount) are prohibited from using the Equivalent Alternative Obligation.

§101.121. Equivalent Alternative Obligation.

(a) The owner and/or operator of a regulated entity that is a major stationary source subject to this subchapter may submit a request to fulfill its Failure to Attain Fee Obligation by substituting emission reductions, on a volatile organic compounds (VOC) or nitrogen oxides (NO_x) specific basis, in an amount equivalent to the tons on which the Failure to Attain Fee has been assessed by relinquishing an equivalent amount of either:

(1) emissions reduction credits;

(2) discrete emission reduction credits;

(3) current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances; or

(4) current or banked Mass Emissions Cap and Trade (MECT) program allowances.

(b) The multiple site aggregation baseline amount calculation is subject to approval by the executive director.

§101.122. Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation.

(a) The owner and/or operator of a major stationary source subject to this subchapter may submit a request to fulfill its Failure to Attain Fee obligation by contributing to a Supplemental Environmental Project, on a pollutant specific basis by either:

(1) an amount equivalent to the tons on which the Failure to Attain Fee has been assessed; or

(2) an amount equivalent to the fee amount assessed.

(b) The Supplemental Environmental Project must:

(1) directly reduce the amount of emissions reaching the atmosphere;

(2) benefit only the subject nonattainment area;

(3) not be part of an agreement or enforceable order allowing the major stationary source to offset a portion of an imposed administrative penalty; and

(4) not include projects that are necessary to bring the major stationary source into compliance with environmental laws or that are necessary to remediate environmental harm caused by a violation caused by the major stationary source.

(c) The multiple site aggregation baseline amount calculation is subject to approval by the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905376
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 239-6090

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.12

The Texas Board of Pardons and Paroles proposes an amendment to 37 TAC §145.12, concerning parole considerations. The amendment to §145.12 is proposed to establish a voting option for placement of offenders into the DWI program.

Rissie Owens, Chair of the Board, determined that for each year of the first five-year period the proposed amendment is in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be to provide a method of selection of certain offenders to undergo a DWI program prior to release. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed. No regulatory flexibility analysis required by HB 3430 is necessary.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under §508.036 and §508.044, Texas Government Code. Section 508.036 requires the board to adopt rules relating to the decision-making processes used by the board and parole panels; and §508.044 providing the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

The amendments are proposed under §508.036, Government Code, which provides the board with the authority to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, providing the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

No other statutes, articles or codes are affected by these amendments.

§145.12. Action upon Review.

A case reviewed by a parole panel for parole consideration may be:

(1) - (3) (No change.)

(4) determined that the totality of the circumstances favor the offender's release on parole, further investigation (FI) is ordered in the following manner; and, upon release to parole, all conditions of parole or release to mandatory supervision that the parole panel is required by law to impose as a condition of parole or release to mandatory supervision are imposed;

(A) - (F) (No change.)

(G) FI-6 (Month/Year)--Transfer to a DWI Program. Release to continuum of care program as required by paragraph (5) of this section;

(H) [~~(G)~~] FI-6 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than six months from specified date. Such TDCJ program may include the Pre-Release Therapeutic Community (PRTC), Pre-Release Substance Abuse Program (PRSAP), or In-Prison Therapeutic Community Program (IPTC), or any other approved tier program;

(I) [~~(H)~~] FI-7 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than seven months from the specified date. Such TDCJ program shall be the Serious and Violent Offender Reentry Initiative (SVORI);

(J) [~~(I)~~] FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than 18 months from specified date. Such TDCJ program shall be either the Sex Offender Treatment Program (SOTP), or the InnerChange Freedom Initiative (IFI);

(5) any person released to parole after completing a TDCJ [~~treatment~~] program as a prerequisite for parole, must participate in and complete any required post-release program. A parole panel shall require as a condition of release on parole or release to mandatory supervision that an offender who immediately before release is a participant in the program established under §501.0931, Government Code, participate as a releasee in a drug or alcohol abuse continuum of care treatment program; or

(6) any [~~Any~~] offender receiving an FI vote, as listed in paragraph (4)(A) - (J) [~~(A-I)~~] of this section, shall be placed in a program consistent with the vote. If treatment program managers recommend a different program for an offender, a transmittal shall be for-

warded to the parole panel requesting approval to place the offender in a different program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905387
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 406-5388

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 24. TRANS-TEXAS CORRIDOR
SUBCHAPTER B. DEVELOPMENT OF FACILITIES

43 TAC §24.13

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Transportation (department) proposes the repeal of §24.13, concerning corridor planning and development. Section 24.13 was previously proposed for amendment in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6311) and that proposal is withdrawn by separate action.

EXPLANATION OF PROPOSED REPEAL

At the Texas Transportation Commission (commission) meeting in October 2009 the commission proposed amendments to §15.9, Corridor Advisory Committees, and new §15.10, Corridor Segment Advisory Committees. The amendments to §15.9 change the rules governing corridor advisory committees to extend the sunset date for those committees. New §15.10 authorizes the creation of corridor segment advisory committees that would, along with corridor advisory committees, assist the department in the planning and development of major corridors in the state, including I-35 and I-69. The primary duties of a corridor segment advisory committee are to provide input, advice, and recommendations to the commission, the department, and corridor advisory committees on transportation improvements to be made in the segment of the corridor for which the committee was created, and on other segment level planning, development, and financing matters as requested by the department.

On October 7, 2009, officials of the department announced that, in response to citizen comments received during the environmental review of Trans-Texas Corridor-35 (TTC-35), the department had recommended the No Action Alternative on the TTC-35 environmental study to the Federal Highway Administration (FHWA). That recommendation effectively ended efforts to develop TTC-35 through the Trans-Texas Corridor concept.

The repeal of §24.13, Corridor Planning and Development, removes the rules relating to the planning and development of the Trans-Texas Corridor, including rules for establishing the Trans-Texas Corridor segment advisory committees, because they are no longer necessary. The segment advisory committees for the I-35 corridor and other elements of the Trans-Texas Corridor will be replaced by advisory committees established under 43 TAC §15.9, Corridor Advisory Committees, and 43 TAC §15.10, Corridor Segment Advisory Committees.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeal as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mark Tomlinson, Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal.

PUBLIC BENEFIT AND COST

Mr. Tomlinson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the repeal will be consistency and clarity of department rules. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §24.13 may be submitted to Mark Tomlinson, Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 4, 2010.

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Transportation Code, Chapter 227.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 227.

§24.13. Corridor Planning and Development.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905364

Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 463-8683

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER O. CRASH RECORDS INFORMATION SYSTEM

43 TAC §25.973

The Texas Department of Transportation (department) proposes amendments to §25.973, Medical Examiner's Report, concerning reporting of a bridge collapse.

EXPLANATION OF PROPOSED AMENDMENTS

Senate Bill 1218, 81st Legislature, Regular Session, 2009, amended Transportation Code, §550.081 relating to the reporting of traffic fatalities by medical examiners. Senate Bill 1218 requires these reports to also contain information on fatalities that occurred as the result of a bridge collapse.

To comply with Senate Bill 1218, amendments to §25.973 add new language requiring a medical examiner, which by the definition in 43 TAC §25.972 includes the justice of the peace if the county does not have a medical examiner, to note in the report if a fatality that occurred in their jurisdiction was the result of a bridge collapse, and if so, the location of the bridge.

Amendments to §25.973 also correct the listed address of the department web site where the reporting form is located.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Carol Rawson, Interim Director, Traffic Operations Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Rawson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the increased availability of statistical information relating to fatalities that have occurred in Texas due to bridge collapses. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §25.973 may be submitted to Carol Rawson, Interim Director, Traffic Operations Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 4, 2010.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §550.081, which requires the department to prepare the form for toxicology reporting.

CROSS REFERENCE TO STATUTE

Transportation Code, §550.081.

§25.973. Medical Examiner's Report.

(a) A medical examiner shall submit to the department on a form prescribed by the department a report detailing the death of a person resulting from a traffic accident within the medical examiner's jurisdiction.

(b) The medical examiner's report must include:

(1) the name of the deceased;

(2) the date of the accident;

(3) the county in which the accident occurred;

(4) whether the deceased was a:

(A) vehicle operator;

(B) vehicle passenger; [~~:~~] or

(C) pedestrian or other person who was not an occupant in a vehicle; [~~and~~]

(5) if the fatality was the result of a bridge collapse as defined in Transportation Code, §550.081(2);

(6) the location of the bridge if the fatality was the result of a bridge collapse; and

(7) [~~(5)~~] except as provided by subsection (c) of this section, the results of any toxicological testing conducted on the deceased and the name of the laboratory, medical examiner's office, or other facility that conducted the testing.

(c) If a toxicological test is conducted and the results are not available at the time the report to the department is due, the medical examiner shall:

(1) note on the report: "toxicological test results unavailable;" and

(2) as soon as practicable after the toxicological test results become available, submit a supplemental report that contains the results of the toxicological testing and the name of the testing facility.

(d) The department will make the reporting form available on the department's web site at www.txdot.gov (keyword "toxicology reporting") [~~http://www.txdot.gov/forms/traffic.htm~~].

(e) Not later than the 11th day of each month, the medical examiner shall submit the reports covering the deaths resulting from traffic accidents that occurred during the preceding three months, including those occurring as a result of a bridge collapse, except that the medical examiner is not required to submit information that was previously submitted to the department.

(f) The department will accept monthly and supplemental medical examiner's reports via:

(1) United States Mail at the address located on the report form;

(2) facsimile at the number contained on the report form; or

(3) the department's Internet website, when such a capability is available.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905365

Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 3, 2010
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER E. APPROVAL OF DISTANCE EDUCATION, OFF-CAMPUS, AND EXTENSION COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §§4.101 - 4.108

The Texas Higher Education Coordinating Board withdraws the proposed repeal of §§4.101 - 4.108 which appeared in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5464).

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905284
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 16, 2009
For further information, please call: (512) 427-6114

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SUBCHAPTER P. APPROVAL OF DISTANCE EDUCATION COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §§4.255 - 4.264

The Texas Higher Education Coordinating Board withdraws the proposed new §§4.255 - 4.264 which appeared in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5277).

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905282
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 16, 2009
For further information, please call: (512) 427-6114

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SUBCHAPTER Q. APPROVAL OF OFF-CAMPUS AND SELF-SUPPORTING COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §§4.270 - 4.279

The Texas Higher Education Coordinating Board withdraws the proposed new §§4.270 - 4.279 which appeared in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5279).

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905283
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 16, 2009
For further information, please call: (512) 427-6114

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CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES

SUBCHAPTER H. PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND PUBLIC TWO-YEAR COLLEGES

19 TAC §9.144

The Texas Higher Education Coordinating Board withdraws the proposed amendment to §9.144 which appeared in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5465).

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TRD-200905281
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 16, 2009
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §§291.72 - 291.75

The Texas State Board of Pharmacy withdraws the proposed amendments to §§291.72 - 291.75 which appeared in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6796).

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905293
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: November 16, 2009
For further information, please call: (512) 305-8028

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 24. TRANS-TEXAS CORRIDOR
SUBCHAPTER B. DEVELOPMENT OF FACILITIES

43 TAC §24.13

The Texas Department of Transportation withdraws the proposed amendment to §24.13 which appeared in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6311).

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905360
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: November 19, 2009
For further information, please call: (512) 463-8683

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

The Office of the Secretary of State adopts the repeal of §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, 81.123 - 81.132, and 81.135 in Subchapter F, relating to Primary Elections, and §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, and 81.157 in Subchapter G, relating to Joint Primary Elections. The Secretary of State simultaneously adopts new §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, and 81.123 - 81.132 in Subchapter F, as well as §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, and 81.157 in Subchapter G.

Sections 81.101, 81.107, 81.116, 81.127, and 81.131 in Subchapter F and §81.157 in Subchapter G are adopted with changes to the text as proposed in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6929). Sections 81.102, 81.103, 81.109, 81.111 - 81.113, 81.115, 81.117, 81.119 - 81.121, 81.123 - 81.126, 81.128 - 81.130, 81.132, 81.145, 81.148, 81.149, 81.151 - 81.153, and 81.155 are adopted without changes and will not be republished.

The revisions to Subchapters F and G concern the financing of the 2010 primary elections with state funds, including the determination of necessary and proper expenses relating to the proper conduct of primary elections by party officials and the procedures for requesting reimbursement by the parties for such expenses.

The adopted repeals and new rules are necessary for the proper and efficient conduct of the 2010 primary elections. It is in the public interest to establish adequate procedures to insure the best use of state funding.

The changes clarify that a 2010 Primary Election Cost Estimate must be submitted even if the chair accepts the pre-populated data. It further explains that the chair has the option to amend the pre-populated data. The reference to the Sworn Advance Agreement is removed from §81.116 because the form is no longer in use. The change to §81.127 clarifies that items purchased with primary funds belong to the party, not the individual. The changes to §81.131 stipulate that the use of the "Model Contract" provided by the Secretary of State satisfies the Secretary of State approval requirement mandated by the Election Code, and that the Model Contract may be modified but must be submitted for Secretary of State approval. Changes to §81.131 further clarify that the county election official must provide to the county chair an accounting of actual costs incurred in performing the contract. Changes to §81.131 and §81.157 make clear that the county election official must pay for items ordered on behalf of the party and seek reimbursement from the party only if stipulated in the contract.

The Secretary of State received one comment from the Texas Republican Party regarding §81.107. Specifically, a reference to the July 1 deadline to reconcile the county primary fund account and return all surplus funds to the state has been reinstated in the adoption because it is a requirement in the Election Code.

SUBCHAPTER F. PRIMARY ELECTIONS

1 TAC §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, 81.123 - 81.132, 81.135

The repeals are adopted under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the proposed repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905456
Ann McGeehan
Director of Elections
Office of the Secretary of State
Effective date: December 13, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 463-5560

♦ ♦ ♦

1 TAC §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, 81.123 - 81.132

The new rules are adopted under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These

sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the rules.

§81.101. Primary and Runoff Election Cost Estimate; Receipt of State Funds.

(a) This subchapter applies to the use and management of all primary funds.

(b) Approval by the Secretary of State of a Primary Election Cost Estimate does not relieve the chair, any employee paid from the primary fund, or the county election official, of their responsibility to comply with administrative rules issued by the Secretary of State, or with any statute governing the use of primary funds.

(c) The Secretary of State shall provide a 2010 Primary Election Cost Estimate to each county chair. The pre-populated amount will be based on 75 percent of the total amount approved on the 2008 Final Primary Election Cost Report less any filing fees received as reported on the 2006 Final Primary Election Cost Report. In order to receive funding for the 2010 Primary, the chair must submit to the Secretary of State a notarized copy of the 2010 Primary Election Cost Estimate. If data was not available to create a pre-populated cost estimate or if the chair wishes to amend the pre-populated estimate, the chair must complete a 2010 Primary Election Cost Estimate form and submit it to the Secretary of State for review and approval prior to receiving their 75 percent of estimated cost.

(d) If a statewide Runoff is conducted, the Secretary of State shall provide a 2010 Primary Runoff Cost Estimate to each county chair. The pre-populated amount will be based on 75 percent of the total amount approved on the 2008 Final Primary Election Cost Report less any filing fees received as reported on the 2006 Final Primary Election Cost Report. In order to receive funding for the 2010 Runoff, the chair must submit to the Secretary of State a notarized copy of a 2010 Primary Runoff Cost Estimate. If data was not available to create a pre-populated cost estimate or if the chair wishes to amend the pre-populated estimate, the chair must complete a 2010 Primary Runoff Election Cost Estimate form and submit it to our office for review and approval prior to receiving their 75 percent of estimated cost.

(e) Pursuant to the General Appropriations Act, 81st Legislature, 2009, counties may not be reimbursed for amounts that exceed the costs to conduct a joint primary election. Accordingly, any additional costs incurred due to the fact that county parties do not use joint polling places or do not use joint voting system equipment will not be reimbursed.

§81.107. Primary-Fund Records.

(a) The county chair shall preserve all records relating to primary-election expenses until the later of:

(1) 22 months following the primary elections; or

(2) the conclusion of any relevant litigation or official investigation.

(b) In order to receive approval of a final cost report, the county chair shall transmit copies of receipts, bills, invoices, contracts, competitive bids, petty-cash receipts for items and services over $2,000 and copies of all monthly bank statements, electronic bookkeeping records (i.e., Quicken or Quickbooks) or check register, and any other related materials documenting primary-fund expenditures. Purchase requisitions are not considered receipts and may not be remitted as such.

(c) Unless otherwise provided by the Secretary of State, not later than July 1 of the year in which the primary elections occur, the county chair shall:

(1) comply with all final cost reporting requirements;

(2) return all unexpended and uncommitted primary funds.

(d) If the chair does not file a final cost report, their files will be reported to the Attorney General's Office and/or County District Attorney's Office for prosecution of misappropriation of funds in accordance with §81.113 of this title (relating to Misuse of State Funds).

§81.116. Estimating Voter Turnout.

(a) The county chair shall use the formula set out in the following figure, with necessary modifications as determined by the chair, to determine the estimated voter turnout for each precinct for the 2010 primary elections. If a county chair receives allocated funds based on the pre-populated Primary Election Cost Estimate, it is not required or necessary to submit an estimation of voter turnout. This general formula is a guideline and must be adjusted if the local political situation indicates a higher voter turnout than that derived by the formula.
Figure: 1 TAC §81.116(a)

(b) After estimating the voter turnout for each precinct, the county chair shall use the guidelines set forth in §§81.117, 81.124, and 81.125 of this title (relating to the Number of Election Workers per Polling Place, Number of Ballots per Voting Precinct, and Number of Direct Record Electronic (DRE) Units or Precinct Ballot Counters per Voting Precinct) to determine the necessary personnel, supplies, and equipment for each precinct (i.e., ballots, election judges and clerks, voting devices, or machines).

(c) After estimating the need for personnel, supplies, and equipment for each precinct, the county chair shall combine all precinct data to determine the total countywide estimate.

(d) The county chair may use the estimate calculated under subsection (c) of this section to determine the cost of the election.

§81.127. Office Equipment and Supplies.

(a) Rental of office equipment is not required in order to conduct primary elections.

(b) The county chair may lease office equipment necessary for the administration of the primary elections for a period beginning December 1, 2009, and ending not later than the last day of the month in which the last primary election is held.

(c) The county party may not rent or lease equipment in which the party, the county chair, or a member of the county chair's family has a financial interest. (See definition of "family" at §81.114(b) of this title (relating to Conflicts of Interest).)

(d) The county chair or party shall rent equipment from an entity that has been in business for at least 18 months and has at least three other bona fide clients and on file with the corporation department of the Secretary of State or locally.

(e) The purchase of office supplies must be reasonable and/or necessary for the administration of the primary election to be payable from the primary fund. (This includes, but is not limited to, the purchase of two paperback copies of the Texas Election Code.)

(f) The county chair or party may be reimbursed for the cost of incidental supplies used in connection with the primary election. (Examples of reasonable incidental supplies include paper, toner, and staples.)

(g) The county chair may not use primary funds to purchase any single office-supply item or equipment valued at over $1,500.

These items become a part of the Party Primary Office and are to be transferred to the next county chair.

(h) The county chair may not pay notary public expenses from the primary fund.

§81.131. Contracting with the County-Elections Officer (County Clerk, County Elections Administrator, or County Tax Assessor-Collector).

(a) The Secretary of State has prepared a Primary Election Services Contract (the "Model Contract"). Copies of the Model Contract may be obtained from the Secretary of State.

(b) The county chair should use the Model Contract when executing an agreement for election services between the county executive committee and the county elections officer. (Contractible election services are listed in Subchapter B of Chapter 31 of the Texas Election Code.) By using the Model Contract, the county chair meets the Secretary of State approval requirement set forth in §31.092(b) of the Texas Election Code.

(c) The Model Contract may be revised as necessary to accommodate the specific agreement between the county chair and county election official; however, activities not required by law are not payable with primary finance funds. Accordingly, those activities should be identified in the contract, including a stipulation as to whether the county chair or the county election official will be responsible for the cost. The county chair shall submit to the Secretary of State for approval any change to the Model Contract or any alternate contract that the chair desires to use. A contract submitted under this subsection must be signed by both parties to the contract, the county chair and county election official.

(d) Before the county chair may make final payment, the county election official must submit to the county chair an accounting of the actual costs incurred in the performance of the election-services contract. This must be included with the Final Primary Election Cost Report.

(e) The Secretary of State may only pay actual costs incurred by the county and payable under provisions of the Texas Election Code, an election-services contract, or these administrative rules.

(f) A contract may not allow for reimbursement for training of election workers or providing materials published by the Secretary of State.

(g) Salaries of personnel regularly employed by the county may not be paid from or reimbursed to the county from the primary fund even if the employee used their vacation time to perform the duties.

(h) A county-elections officer may not contract for the performance of any duty or service that he or she is statutorily obligated to perform.

(i) Costs associated with an election services contract are not counted toward the administrative salary limits established under §81.123 of this title (relating to Administrative Personnel Limited).

(j) If authorized in the contract, county election officials who contract or conduct joint primaries must pay all bills for items they order on behalf of the parties, and seek reimbursements from the parties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905457
Ann McGeehan
Director of Elections
Office of the Secretary of State
Effective date: December 13, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 463-5560

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SUBCHAPTER G. JOINT PRIMARY ELECTIONS

1 TAC §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, 81.157

The repeals are adopted under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905458
Ann McGeehan
Director of Elections
Office of the Secretary of State
Effective date: December 13, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 463-5560

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1 TAC §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, 81.157

The rules are adopted under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the rules.

§81.157. Joint-Primary Contract with the County Elections Officer (County Clerk, County Elections Administrator, or County Tax Assessor Collector).

(a) Before the county chair may make final payment, the county elections officer must submit to the county chair an accounting of actual costs incurred in performance of the election-services contract for the joint-primary election. This must be included with the Final Primary Election Cost Report.

(b) The Secretary of State may only reimburse actual costs incurred by the county and payable pursuant to provisions of the Texas Election Code, a joint primary contract, or an administrative rule.

(c) The Secretary of State may only reimburse actual costs incurred by the county and payable pursuant to provisions of the Texas Election Code, a joint primary contract, or an administrative rule.

(d) If the joint elections agreement requires the county elections officer to directly pay the costs associated with the joint election, then the county chair shall remit the total amount of state funds forwarded to the county chair pursuant to Section B of the Final Cost Estimate to the county clerk no later than the fifth day after receipt of the funds.

(e) The cost estimate may not provide for reimbursement for training of election workers or for materials provided by the Secretary of State.

(f) The county may not reimburse from primary-election funds, regular pay for personnel normally employed by the county.

(g) The joint resolution for the 2010 primary elections may not provide for any salary or compensation for the county elections officer for the performance of any statutory duty or service. (Note: Joint Primary Election Agreements do not count against the administrative salary limits set out under §81.123 of this title (relating to Administrative Personnel Limited).)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905459
Ann McGeehan
Director of Elections
Office of the Secretary of State
Effective date: December 13, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 463-5560

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER E. DATE PALM LETHAL DECLINE QUARANTINE

4 TAC §19.51

The Texas Department of Agriculture (the department) adopts an amendment to §19.51 in order to expand the quarantined area for the Date Palm Lethal Decline Quarantine, without changes to the proposal published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6724). The amendment is adopted to add to the quarantined area a 2-mile area surrounding the palms infected with the date palm lethal decline at one site in Kleberg County. In late June of 2009, some of the sabal palms and date palms located in Kleberg County were suspected to be infected with the date palm lethal decline disease. Consequently, samples from the apparently infected sabal palms and date palms were collected and analyzed for the disease by the Texas Plant Disease Diagnostic Laboratory at College Station. The test results, received on or about July 25, 2009, showed 3 of the 10 samples to be positive for the date palm lethal decline disease. Because the three infected palms are located within approximately 100 feet of one another, they are considered as originating from one site for establishment of the quarantined area. The amended section was adopted on an emergency basis on August 3, 2009, as published in the August 21, 2009, issue of the *Texas Register* (34 TexReg 5625) to prevent spread of the date palm lethal decline. The amendment will facilitate treatment of the disease vectors and restrict movement of the quarantined articles located within two miles of an infected tree as described in the Date Palm Lethal Decline Quarantine.

Amended §19.51 adds a 2-mile area surrounding the three infected palms occurring in close proximity at one site in Kleberg County of Texas to the quarantined area.

No comments were received on the proposal.

The amendment to §19.51 is adopted under the Texas Agriculture Code (the Code) §71.002, which provides the department with the authority to quarantine an area if it determines that a dangerous insect pest or plant disease not widely distributed in this state exists within an area of the state; the Code, §71.003, which provides the department with the authority to declare an area pest-free and quarantine surrounding areas if it determines that an insect pest or plant disease of general distribution in this state does not exist in an area; and the Code, §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for a specific treatment of quarantined articles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2009.

TRD-200905315
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 15, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (Department) adopts the repeal of 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines followed by the Real Estate Analysis Division, without changes to the proposal as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6491) and will not be republished.

The repeal is adopted in order to consolidate and simplify the existing rules for all Real Estate Analysis.

Public hearings on the repeal were held in Dallas, Houston, El Paso, Harlingen, Lubbock, and Austin. Additionally, written comments on the proposed repeal were accepted by mail, e-mail, and facsimile through October 26, 2009.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting this repeal on November 9, 2009.

The repealed sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905347
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 9, 2009
Proposal publication date: September 25, 2009
For further information, please call: (512) 475-3916

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10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment and Reserve for Replacement Rules and Guidelines followed by the Real Estate Analysis Division. Sections 1.31 - 1.37 are adopted with changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6491).

Public hearings on the new sections were held in Dallas, Houston, El Paso, Harlingen, Lubbock, and Austin. Additionally, written comments on the proposed new rules were accepted by mail, e-mail and facsimile through October 26, 2009.

SUMMARY OF COMMENTS, STAFF RESPONSE AND BOARD ACTION.

Public comments and the Department's responses are presented in the order in which the sections appear in the proposed §1.32, starting with §1.32(e)(2) and ending with §1.32(i)(5). Following the section number is the title of the section as it appears in the rule. Each number following the title corresponds to the person(s) who commented on the particular rule section. The key relating each number next to the title is listed below. Following the identification of the commenter is a summary of the comment. Staff response and recommendation is detailed, along with reason(s) why the recommendation was made.

Comments were received by: (1) Matthew Malcom, CPA, Reznick Group, P.C.; (2) Barry Kahn, (3) Granger McDonald, and (4) Jim Brown (TAAHP).

§1.32(e)(2). Off-Site Costs. (1)

COMMENT: Comments suggested that CPA firms cannot render an opinion on this type of subject matter. The CPA firm could issue a statement of the findings resulting from specific procedures performed under an Agreed-Upon Procedures engagement to compare the facts of the subject development to the facts contained in the PLR.

STAFF RESPONSE: Staff concurred with the comment. Staff recommended the following language to reflect receipt of a statement of findings in lieu of an opinion:

§1.32(e)(2). Off-site Costs.

Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer, and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form. If off-site costs are included in eligible basis based on PLR 200916007, a statement of findings from a CPA must also be provided which describes the facts relevant to the development and affirmatively certifies that the fact pattern of the development matches the fact pattern in PLR 200916007. A certification from a Third Party engineer must also be provided that describes the circumstances of the necessity of the off-site improvement, including the relevant requirements of the local jurisdiction with authority over building codes.

§1.32(e)(3). Site Work Costs. (2), (3) and (4)

COMMENT: Commenters requested an increase to site work cost limitation from $9,000 per unit to $12,000 per unit. The stated reason is that the $9,000 per unit limit has been in place for a number of years and site work costs have increased. Comment was also received suggesting that the cost of obtaining the certifications to exceed the $9,000 per unit limitation is an unnecessary expense. Additionally, comment was received proposing that a definition of site work costs used for the purpose of calculating the threshold should only include demolition, rough grading, on-site concrete, on-site electrical, on-site paving, and on-site utilities.

STAFF RESPONSE: This provision does not limit site work costs to $9,000 per unit. Site work costs above $9,000 per unit are allowable with certification from a third-party engineer. Very few applications are submitted with site work costs exceeding $9,000 per unit. Those that do are properties with unusual site conditions that generally have already been evaluated by an engi-

neer. For deals exceeding this level, staff needs objective cost information supplied by an engineer to rely on for underwriting. Therefore, Staff did not recommend an increase to the $9,000 per unit threshold.

Staff agreed that defining what constitutes site work for this threshold test would be useful, but does not believe at this late time a definition should be included in the rule without providing the public an opportunity to comment on the definition so as not to exclude items that may be considered legitimate site work but have not been included in the commenter's draft rule. Staff will continue to interpret this based on engineering certifications for the current year and therefore does not believe the issue is significant enough to repost the rules. Staff will add this definition for public discussion at the next point revisions are made to the rules. No changes were recommended.

§1.32(i)(2). Deferred Developer Fee. (2) and (4)

COMMENT: Commenters requested that TDHCA allow a waiver of this provision if the applicant provides a letter from the syndicator/equity investor stating they are comfortable that the issue of good debt will be appropriately addressed in the partnership agreement.

STAFF RESPONSE: Equity structures vary widely and there are many structuring vehicles to deal with developer fee that remains payable at the end of 15 years. Generally, however, this is not an expectation of the equity partner. These provisions exist to deal with the remaining developer fee should property cash flow not be sufficient to repay the developer fee note. Staff uses this provision as one of four (4) feasibility tests in the underwriting of applications. Staff is not able to analyze the many structural provisions that are possible to deal with this issue. The current rule establishes a consistent methodology so all deals are equally analyzed. No changes were recommended.

§1.32(i)(5). Initial Feasibility. (2) and (4)

COMMENT: Commenters requested an increase of the 65% expense to income ratio maximum to 75%.

STAFF RESPONSE: In response to comments made prior to publication of the draft rule, staff proposed in the Draft 2010 REA Rules a provision increasing the expense to income ratio on rural transactions that contain less than 36 units to 68%. Staff uses this provision as one of four (4) feasibility tests in the underwriting of applications. Generally, a property with a high expense to income ratio will demonstrate a decreasing debt coverage ratio over time using certain assumptions for income and expense increases over the long-term proforma. Deals exceeding the 65% mark in the first stabilized year are at much greater risk of long-term infeasibility. There are compensating factors that can serve to mitigate this risk. Some of these factors are contemplated in the current rule. While other variables may be valid, Staff would not be able to analyze all of the possible mitigating factors specific to a particular transaction nor be able to fairly apply the rule across all applications. A high expense to income ratio is indicative of deep-rent targeting which can in many circumstances be detrimental to long-term feasibility. No change was recommended.

The Board approved the final order adopting the changes, as amended, as well as administrative changes as needed for consistency within this section, on November 9, 2009.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department the authority to adopt rules governing the administration of the Department and its program.

§1.31. General Provisions.

(a) Purpose. The rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee (the "Committee"), Executive Director, and TDHCA Governing Board (the "Board") to help ensure procedural consistency in the determination of Development feasibility (§2306.0661(f) and §2306.6710(d), Texas Government Code). Due to the unique characteristics of each development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Terms used in this subchapter that are also defined in Chapter 50 of this title (the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP. Those terms that are not defined in the QAP or which may have another meaning when used in this subchapter, shall have the meanings set forth in §1.32(b) of this subchapter.

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, location, unit amenities, utility structure, and common amenities, and:

(A) for purposes of calculating the inclusive capture rate targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum rent limits based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(8) Development--Sometimes referred to as the "Subject Development." Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

(9) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Tax Credit Allocation.

(11) ESA--Environmental Site Assessment. An environmental report that conforms with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter as it relates to a specific Development.

(12) First Lien Lender--A lender whose lien has first priority.

(13) Gross Capture Rate--The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand.

(14) Gross Demand--The sum of Potential Demand from the Primary Market (PMA), demand from other sources, and Potential Demand from a Secondary Market Area (SMA) to the extent that SMA demand does not exceed 25% of Gross Demand.

(15) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance which are developed by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") or national non-metro area.

(16) Hard Costs--The sum total of direct construction costs, site work costs, off-site costs and contingency.

(17) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development.

(18) Market Analyst--Any person who prepares a market study.

(19) Market Rent--The rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units on properties without rent and income restrictions.

(20) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(21) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(22) Primary Market--Sometimes referred to as "Primary Market Area" or "PMA." The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this subchapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(23) Property Condition Assessment--Sometimes referred to as "PCA," "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The PCA provides an evaluation of the physical condition of an existing property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the property. The PCA must be prepared in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter as it relates to a specific Development.

(24) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(25) Relevant Supply--The relevant supply of proposed and unstabilized Comparable Units includes:

(A) The proposed subject Units;

(B) Comparable Units with priority over the subject, based on the Department's evaluation process described in §50.9(d)(5) of this title, that have made application to TDHCA and have not been presented to the TDHCA Board for decision; and

(C) Comparable Units in previously approved but Unstabilized Developments in the Primary Market Area (PMA); and

(D) Comparable Units in previously approved but Unstabilized Developments in the Secondary Market Area (SMA), in the same proportion as the proportion of Potential Demand from the SMA that is included in Gross Demand.

(26) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 50% of gross income towards total housing expenses.

(27) Reserve Account--An individual account:

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(28) Restricted Market Rent--The restricted rent concluded by the Qualified Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units on properties with the same rent and income restrictions.

(29) Secondary Market--Sometimes referred to as "Secondary Market Area." The area defined by the Qualified Market Analyst as described in §1.33(d)(7) of this subchapter.

(30) Sub-Market--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(31) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households

transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services.

(32) Sustaining Occupancy--Sometimes referred to as "Breakeven Occupancy." The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(33) TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 60, Subchapter A of this title, and published on the Department's web site.

(34) Underwriter--The author(s) of the Credit Underwriting Analysis Report.

(35) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least twelve (12) consecutive months following construction completion.

(36) Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing, a documented estimate from the utility provider proposed in the Application, or for an existing development an allowance calculated by the Department pursuant to §60.109 of this title. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject development and consistent with the building plans provided.

(37) Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, §1.7 and §1.8 of this chapter include general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution methods as outlined in §1.17 of this chapter.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department Governing Board has authorized the development of these rules under its authority under §2306.148, Texas Government Code. The rules provide a mechanism to produce consistent information in the form of a Credit Underwriting Analysis Report to provide interested parties information the Board relies upon in balancing the desire to assist as many Texans as possible by providing no more financing than necessary and have independent verification that Developments are economically feasible. The Report should consider all information timely provided by the Applicant. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. The Report will be based solely upon information that is provided in accordance with the time frames provided in the current QAP, Program Rules or Notice of Funds Availability as appropriate. The Report should also identify the number of revisions and date of most current revision to any information deemed to be relevant by the Underwriter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Housing Tax Credits based on the lesser amount calculated by the program limit method, if applicable, gap/DCR method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Developments requesting Housing Tax Credits, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in the QAP. For Developments requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on current program rules at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by total development cost less total non-Department-sourced funds or Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the DCR standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the Application documentation.

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by subtracting operating expenses, including replacement reserves and taxes, from EGI to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee, which could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will update the utility allowance and calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application. The conservative basis for a restricted unit is the lesser of the Gross Program Rent less Utility Allowances ("Net Program Rent") or Restricted Market Rent. The conservative basis for an unrestricted unit is the lesser of the Market Rent or Applicant's projected rent where the Applicant's projected rent is reasonable to the Underwriter as supported by documentation of Comparable Units and as independently verified by the Underwriter. Where Contract Rents are included, they will be used regardless of the conservative basis derived rent.

(i) Market Rents. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(ii) Restricted Market Rent. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size and income and rent restrictions provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Restricted Market Rent by unit, as long as the proposed Restricted Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable restricted rent. Random checks of the validity of the Restricted Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(iii) Gross Program Rents less Utility Allowance or Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application. The Underwriter uses the Gross Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the Applications are underwritten with the rents promulgated for the same year. Gross Program Rents are reduced by the Utility Allowance. If Program Rents are adjusted by the Department after the close of the Application Acceptance Period but prior to publication of the Report, the Underwriter will adjust the Applicant's EGI to account for any increase or decrease in Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the Application when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(iv) Contract Rents. The Underwriter reviews submitted rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The underwriting analysis will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used in the underwriting analysis with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $20 per unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties within the PMA or SMA.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from Eligible Basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development.

(C) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income. The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within 5% of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's proforma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of properties in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropri-

ate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by experience of third parties not related to the contractor or component vendor. Finally, well documented information provided in the Market Analysis, the Application, and other sources may be considered.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, 5% of the Effective Gross Income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as 3% may be utilized if documented by a fully executed management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional development. It does not, however, include direct security payroll or additional supportive services payroll. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas and Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The underwriting tolerance level for this line item is 30%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The underwriting tolerance level for this line item is 10%.

(i) The per unit assessed value will be calculated based on the capitalization rate published on the county taxing authority's website. If the county taxing authority does not publish a capitalization rate on the internet, a capitalization rate of 10% will be used or comparable assessed values may be used in evaluating this line item expense.

(ii) Property tax exemptions or "Proposed Payment In Lieu Of Tax" agreement (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. At the discretion of the Underwriter, a property tax exemption that meets known federal, state and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. The Applicant's expense for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund future capital needs as documented by the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, not including depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees also are not considered in the Department's calculation of debt coverage. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the documented cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. The Underwriter will not evaluate any selection points for this item. The Underwriter's verification will be limited to assuring any anticipated costs are included. For all transactions supportive services expenses are considered in calculating the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development. The Applicant's amount is typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll expense estimate discussed in subparagraph (C) of this paragraph.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time; however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered in calculating the Debt Coverage Ratio.

(iv) Cable Television Expense. Cable Television Expense includes fees charged directly to the owner of the Development to provide cable services to all units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in General and Administrative Expense as described in subparagraph (A) of this paragraph.

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If a rationale acceptable to the Underwriter for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as

reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income. NOI is the difference between the EGI and total operating expenses. If the Year 1 NOI figure provided by the Applicant is within 5% of the Year 1 NOI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the Year 1 DCR the Underwriter will maintain and use his independent calculation of NOI unless the Applicant's Year 1 EGI, Year 1 total expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter. Commitments indicating a variable rate must provide a detailed breakdown of the component rates comprising the all-in rate. The commitment must also state the lender's underwriting interest rate, or the Applicant must submit a separate statement executed by the lender with an estimate of the interest rate as of the date of the statement. The Underwriter may challenge the interest rate based on data collected on similarly structured transactions.

(B) Amortization Period. The Department requires an amortization of not less than thirty (30) years and not more than forty (40) years (fifty (50) years for federally sourced loans), or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for Developments with permanent financing structures with balloon payments in less than thirty (30) years, the Underwriter will carry forward Debt Service calculated based on a full amortization and the interest rate stated in the commitment.

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 or greater than 1.35 based upon documentation of acceptance from the lender.

(i) For Developments other than HOPE VI and USDA Rural Development transactions, if the DCR is less than the minimum, the recommendations of the Report are conditioned upon a reduced debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reduction of the interest rate or an increase in the amortization period for TDHCA funded loans;

(II) A reclassification of TDHCA funded loans to reflect grants, if permitted by program rules;

(III) A reduction in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the minimum, the recommendations of the Report may be conditioned upon an increase in the debt service and the Underwriter may make adjustments to the requested financing structure in the order presented in subclauses (I) and (II) of this clause. If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reclassification of TDHCA funded grants to reflect loans, if permitted by program rules;

(II) An increase in the interest rate or a decrease in the amortization period for TDHCA funded loans;

(III) An increase in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Tax Credit allocation may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in Debt Service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

(A) The base year projection utilized is the Underwriter's Year 1 EGI, Year 1 operating expenses, and Year 1 NOI unless the Applicant's Year 1 EGI, Year 1 total operating expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include:

(i) Documentation with terms for project-based rental assistance or operating subsidy;

(ii) A fully executed management contract with clear terms;

(iii) Documentation prepared and signed by the Central Appraisal District (CAD) with jurisdiction over the Development indicating the appraisal methodology consistently employed by the CAD and a ten-year history, beginning with the Application year, of tax rates for each taxing district with jurisdiction over the Development; and

(iv) Required reserve for replacement schedule prepared and signed by the proposed permanent lender or equity provider. In no instance will the reserve for replacement figure included in the Long Term Proforma be less than the minimum requirements as described in §1.37 of this subchapter.

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools

available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's total development cost is within 5% of the Underwriter's estimate. The Department's estimate of the total development cost for acquisition/rehabilitation will be based in accordance with the PCA's estimated cost for the scope of work as defined by the Applicant and §1.36(5) of this subchapter. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remainder acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated based on acreage from the total cost reflected in the site control document(s). An appraisal containing segregated values for the total acreage, the acreage for the subject site and the remainder acreage, or tax assessment value may be tools that are used by the Underwriter in making a proration determination based on relative value; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team or permanent lender:

(I) Is the current owner in whole or in part of the proposed property; or

(II) Was the owner in whole or in part of the proposed property during any period within the thirty-six (36) months prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide subclauses (I) and (II) of this clause.

(I) The original acquisition cost listed in the submitted settlement statement or, if a settlement statement is not available, the original asset value listed in the most current audited financial statement for the identity of interest owner; and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application:

(-a-) an appraisal that meets the requirements of §1.34 of this subchapter; and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at 10%, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate of 10%, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(iii) In no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph.

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The Underwriter will prorate the actual sales price or identity of interest adjusted sales price based upon a calculated "as-is" improvement value over the total "as-is" value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment. In the case where the land value indicated by either the appraisal or tax assessment is greater than the prorata land value attributed to the sales price as described above, the greater of the land value in the appraisal or tax assessment is deducted from the sales price to determine the acquisition basis.

(2) Off-Site Costs. Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form. If off-site costs are included in eligible basis based on PLR 200916007, a statement of findings from a CPA must also be provided which describes the facts relevant to the Development and affirmatively certifies that the fact pattern of the development matches the fact pattern in PLR 200916007. A certification from a Third Party engineer must also be provided that describes the circumstances of the necessity of the off-site improvement, including the relevant requirements of the local jurisdiction with authority over building codes.

(3) Site Work Costs. Project site work costs exceeding $9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form. In addition, for Applicants seeking Tax Credits, documentation in keeping with §50.9(h)(6)(G) of this title will be utilized in calculating eligible basis.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party cost estimating data source and historical final cost certifications of all previous Housing Tax Credit allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party data source, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains ameni-

ties or specifications not included in the Average Quality standard, the Department will take into account these costs.

(ii) If the difference in the Applicant's direct cost estimate and the direct construction cost estimate detailed in clause (i) of this subparagraph is more than 5%, the Underwriter shall also evaluate the direct construction cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(I) the county in which the Development is to be located; or

(II) if cost certifications are unavailable under subclause (I) of this clause, the uniform state service region in which the Development is to be located; or

(III) other Developments by the same Applicant that are similar in design to the subject Development.

(B) Rehabilitation including Reconstruction Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule and/or the Applicant's scope of work, the Underwriter may request a supplement executed by the PCA provider reconciling the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant's project cost schedule including any soft cost contingency will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 7% of direct construction costs plus site work for new construction Developments and 10% of direct construction costs plus site work for rehabilitation Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited to a total of 14% on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16% on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18% on Developments with Hard Costs at $2 million or less. For tax credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible construction costs but will be ineligible for tax credit basis purposes.

(7) Developer Fee. Developer fee claimed must be multiplied by the appropriate applicable percentage depending whether it is attributable to acquisition or rehabilitation basis, consistent with §50.9(d)(6) of this title. Additional fees for ineligible costs will be limited to the same percentage of ineligible development costs (15% for Developments with 50 or more units, or 20% for Developments with 49 or fewer units) but will be ineligible for tax credit basis purposes. All fees to related parties to the owner or developer for work determined by the Underwriter to be typically completed by the developer will be considered part of the Developer fee claimed.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for Developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for Developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits:

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for Developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for Developments proposing 49 units or less; and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) For non-Tax Credit Developments, the percentage can be up to 15% but is based upon total development costs less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any other identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period financing is limited to not more than one (1) year's fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered in the determination of developer fee.

(9) Reserves. The Department will utilize the amount described in the Applicant's project cost schedule if it is within the range of two (2) to six (6) months of stabilized operating expenses less management fees and reserve for replacements plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the conventional lender or syndicator if the detail for such greater amount is well documented in the conventional lender or syndicator commitment letter.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from Eligible Basis.

(f) Developer Capacity. The Department will review personal credit reports for development sponsors, developer fee recipients and those individuals anticipated to guarantee the completion of the Development. The Underwriter will evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements in the QAP and statute.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year

floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain; or

(C) The Development must be designed to comply with the QAP, as proposed.

(2) The Underwriter will identify in the report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in the following areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development;

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter;

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of the following: executed subsidy commitment(s); set-aside of Applicant's financial resources; to be substantiated by an audited financial statement evidencing sufficient resources; and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities; and/or

(D) Development Costs. For Supportive Housing that is styled as efficiencies, the Underwriter may use "Average Quality" dormitory costs, or costs of other appropriate design styles from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (4) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Gross Capture Rate. The method for determining the Gross Capture Rate for a Development is defined in §1.33(d)(10)(F) of this subchapter. The Underwriter will independently verify all components and conclusions of the Gross Capture Rate and may at their discretion use independently acquired demographic data to calculate demand and may make a determination of the effective Gross Capture Rate based upon an analysis of the Sub-market. The Development:

(A) is characterized as a Qualified Elderly Development (including the Elderly section of an Intergenerational Development) and the Gross Capture Rate exceeds 10% for the total proposed units; or

(B) is in an Urban Area and targets the general population, and the Gross Capture Rate exceeds 10% for the total proposed units; or

(C) is in a Rural Area and targets the general population, and the Gross Capture Rate exceeds 30%; or

(D) targets Persons with Special Needs and the Gross Capture rate exceeds 30%.

(E) Developments meeting the requirements of subparagraph (A), (B), (C), or (D) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this subchapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

(2) Deferred Developer Fee. Developments requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first fifteen (15) years of the long term proforma as described in subsection (d)(5) of this section.

(3) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the Net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the Applicant accepts the Underwriting recommendation that all restricted units have rents and incomes restricted at or below the 50% of AMGI level.

(4) Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 68%

for rural developments 36 units or less and 65% for all other developments.

(5) Long Term Feasibility. Any year in the first fifteen (15) years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects:

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(6) Exceptions. The infeasibility conclusions may be excepted where either of the following apply.

(A) The requirements in this subsection may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments meeting the requirements of one or more of paragraphs (3) - (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (vi) of this subparagraph apply.

(i) The Development will receive Project-based Section 8 Rental Assistance for at least 50% of the units and a firm commitment with terms including contract rent and number of units is submitted at application.

(ii) The Development will receive rental assistance for at least 50% of the units in association with USDA-RD-RHS financing.

(iii) The Development will be characterized as public housing as defined by HUD for at least 50% of the units.

(iv) The Development will be characterized as Supportive Housing for at least 50% of the units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents for at least 50% of the units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Restricted Market Rent.

(vi) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst (§2306.67055.) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) If not listed as approved by the Department, Market Analysts must submit subparagraphs (A) - (F) of this paragraph at least thirty (30) days prior to the first day of the Application Acceptance Period for which the Market Analyst must be approved. To maintain status as an approved Qualified Market Analyst, updates to the items described in subparagraphs (A) - (C) of this paragraph must be submitted annually on the first Monday in February for review by the Department.

(A) Documentation of good standing from the Texas Comptroller of Public Accounts.

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the application round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the application round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least ninety (90) prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(3) The list of approved Qualified Market Analysts is posted on the Department's web site and updated within seventy-two (72) hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a for-

mat that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(5) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(6) Statement of Ownership. Disclose the current owners of record and provide a three (3) year history of ownership for the subject Property.

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055.)

(A) The Secondary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 250,000 people inclusive of the Primary Market Area; and

(ii) boundaries based on U.S. census tracts.

(B) The Market Analyst's definition of the Secondary Market Area must include:

(i) a detailed description of why the subject Development is expected to draw a significant number of tenants or homebuyers from the defined SMA;

(ii) a complete demographic report for the defined SMA; and

(iii) a scaled distance map indicating the SMA boundaries as well as the location of the subject Development and all comparable Developments.

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The Primary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the Primary Market Area must include:

(i) a detailed description of why the subject Development is expected to draw a majority of its prospective tenants or homebuyers from the defined PMA;

(ii) a complete demographic report for the defined PMA; and

(iii) a scaled distance map indicating the PMA boundaries as well as the location of the subject Development and all comparable Developments.

(C) Comparable Units. Identify Developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each Development consisting of:

(i) Development name;

(ii) Address;

(iii) Year of construction and year of rehabilitation, if applicable;

(iv) Property condition;

(v) Population target;

(vi) Unit mix specifying number of Bedrooms, number of baths, net rentable square footage; and

(I) monthly rent and utility allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) Description of concessions;

(viii) List of unit amenities;

(ix) Utility structure;

(x) List of common amenities; and

(xi) For rental developments only.

(I) occupancy; and

(II) turnover.

(9) Market Information.

(A) For each of the defined market areas, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the SMA, if applicable:

(i) total housing;

(ii) rental developments (all multi-family);

(iii) Affordable Housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C) of this subchapter). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Targeted Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports.

(i) All demographic reports must include population and household data for a five (5) year period with the year of application as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations; and

(iii) For Developments targeting seniors, all demographic reports must provide a detailed breakdown of households by age and by income.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to elderly population for an elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the following they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five (5) year period with the year of application as the base year.

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up).

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 50% for Qualified Elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up) or one person for efficiency units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and Potential Demand from a Secondary Market Area (SMA) to the extent that SMA demand does not exceed 25% of Gross Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up) or one person for efficiency units.

(II) For Developments targeting the general population:

(-a-) Minimum eligible income is based on a 35% rent to income ratio;

(-b-) Appropriate household size is defined as 1.5 persons per Bedroom (rounded up); and

(-c-) The tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all units having three (3) or more bedrooms:

(-a-) Minimum eligible income is based on a 35% rent to income ratio;

(-b-) Appropriate household size is defined as 1.5 persons per bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) For Developments targeting the senior population:

(-a-) Minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households.

(iv) Demand from Secondary Market Area:

(I) Potential Demand from an SMA should be calculated in the same way as Potential Demand from the PMA;

(II) Potential Demand from an SMA may be included in Gross Demand to the extent that SMA demand does not exceed 25% of Gross Demand; and

(III) The supply of proposed and unstabilized comparable units in the SMA must be included in the calculation of the capture rate at the same proportion that Potential Demand from the SMA is included in Gross Demand.

(v) Demand from Other Sources:

(I) The source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) Consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) If households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) Documentation of the number of vouchers administered by the local Housing Authority;

(-b-) A complete demographic report for the area in which the vouchers are distributed.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (I) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand within the PMA.

(B) Rents. Provide a separate Market Rent and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this subchapter. Rent Adjustments. In support of the Market Rent and Restricted Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed unit type by number of Bedrooms and rental restriction category.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Total adjustments in excess of 15% must be supported with additional narrative.

(v) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent and Restricted Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand:

(i) State the Gross Demand for each Unit type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI); and

(ii) State the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one unit due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The relevant supply of proposed and unstabilized comparable units includes:

(i) The proposed subject Units;

(ii) Comparable Units with priority, as defined in §50.9 of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision;

(iii) Comparable Units in previously approved but Unstabilized Developments in the PMA; and

(iv) Comparable Units in previously approved but Unstabilized Developments in the SMA, in the same proportion as the proportion of Potential Demand from the SMA that is included in Gross Demand.

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. The Market Analyst must calculate a Gross Capture Rate for the subject Development as a whole, as well as for each Unit type by number of Bedrooms and rent restriction categories, and market rate Units, if applicable. Refer to §1.32(i) of this subchapter for feasibility criteria.

(G) A complete demand and capture rate analysis is required in every Market Study, regardless of the current occupancy level of an existing Development.

(H) Absorption. Project an absorption period for the subject Development to achieve Sustaining Occupancy. State the absorption rate.

(I) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market analysis considering the combined PMA's and all proposed and unstabilized units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§1.34. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on

the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report.

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three (3) years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the cost approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three (3) year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three (3) year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The net operating income statistics or the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation final value estimate is required.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) Appraisal assignments for new construction are required to provide an "as completed" value of the proposed structures. These reports shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value.

(C) Reports on Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. The appraiser should consider the fee simple or leased fee interest as appropriate.

(D) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department should be conducted and reported in conformity with the standards of the American Society for Testing and Materials. The initial report should conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-05). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to TDHCA as a User of the report (as defined by ASTM standards.) Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The ESA report should also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment, and that the fee is in no way contingent upon the outcome of the assessment. The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for asbestos containing materials (ACMs) would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(6) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements; and

(7) Assess the potential for the presence of Radon on the property, and recommend specific testing if necessary.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as a TX-USDA-RHS funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this subsection.

§1.36. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment is to provide cost estimates for repairs, replacements, or new construction which are: immediately necessary repairs and replacements; improvements proposed by the Applicant as outlined in a scope of work narrative submitted by the Applicant to the PCA provider that is consistent with the scope of work provided in the Application; and expected to be required throughout the term of the regulatory period and not less than thirty (30) years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018") except as provided for in subsections (b) and (c) of this section. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA must include the Department's PCA Cost Schedule Supplement which details all rehabilitation costs and projected repairs and replacements through thirty (30) years. The PCA must also include discussion and analysis of the following:

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject property;

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points;

(4) Statement of Acknowledgement. The PCA provider must affirm in the report that the Applicant's scope of work for improvements and the immediate needs of the rehabilitation are considered and reconciled within the PCA report and the PCA Cost Schedule Supplement; and

(5) Cost Estimates for Repair and Replacement. It is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA provider is apprised of all development activities associated with the proposed transaction and consistency of the total immediately necessary and proposed repair and replacement cost estimates with the development cost schedule and scope of work submitted as an exhibit of the Application.

(A) Immediately Necessary Repairs and Replacement. Systems or components which are expected to have a remaining useful life of less than one (1) year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered immediately necessary repair and replacement. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional repair, replacement, or new construction above and beyond the immediate repair and replacement described in subparagraph (A) of this paragraph, such items must be identified and the nature or source of obsolescence or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or new construction which is identified as being above and beyond the immediate need, citing the basis or the source from which such cost estimate is derived.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than fifteen (15) years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(b) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments;

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports;

(4) TX-USDA-RHS guidelines for Capital Needs Assessment; or

(5) Standard and Poor's Property Condition Assessment Criteria: Guidelines for Conducting Property Condition Assessments, Multifamily Buildings.

(c) The Department may consider for acceptance reports prepared according to other standards which are not specifically named above in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA should be signed and dated by the report provider not more than six (6) months prior to the date of the application.

§1.37. Reserve for Replacement Rules and Guidelines.

(a) General Provisions. The Department will require Developments to provide regular maintenance to keep housing sanitary, safe and decent by maintaining a reserve for replacement in accordance with §2306.186 Texas Government Code. The reserve must be established for each unit in a Development of 25 or more rental units, regardless of the amount of rent charged for the unit. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section.

(b) The First Lien Lender shall maintain the reserve account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and §2306.186 Texas Government Code.

(1) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond indenture or tax credit syndication, the Department shall:

(A) Be a required signatory party in all escrow agreements for the maintenance of reserve funds;

(B) Be given notice of any asset management findings or reports, transfer of money in reserve accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within thirty (30) days of any receipt or determination thereof; and

(C) Subordinate its rights and responsibilities under the escrow agreement, including those described in this subsection, to the First Lien Lender or Bank Trustee through a subordination agreement subject to its ability to do so under the law and normal and customary limitations for fraud and other conditions contained in the Department's standard subordination clause agreements as modified from time to time, to include subsection (c) of this section.

(2) The escrow agreement and subordination agreement, if applicable, shall further specify the time and circumstances under which the Department can exercise its rights under the escrow agreement in order to fulfill its obligations under §2306.186 Texas Government Code and as described in this section.

(3) Where the Department is the First Lien Lender and there is no Bank Trustee as a result of a bond indenture or tax credit syndication or where there is no First Lien Lender but the allocation of funds by the Department and §2306.186 Texas Government Code requires that the Department oversee a Reserve Account, the Owner shall provide at their sole expense for appointment of an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent

at a cost plus fee payable by the Owner due to breach of the escrow agent's responsibilities or otherwise with thirty (30) days prior notice of all parties to the escrow agreement.

(c) If the Department is not the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) Reserve for replacement requirements under the first lien loan agreement;

(2) Monitoring standards established by the First Lien Lender to ensure compliance with the established reserve for replacement requirements; and

(3) A statement by the First Lien Lender:

(A) That the Development has met all established reserve for replacement requirements; or

(B) Of the plan of action to bring the Development in compliance with all established reserve for replacement requirements, if necessary.

(d) If the Development meets the minimum unit size described in subsection (a) of this section and the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Owner receiving Department assistance for multifamily rental housing shall set aside the repair reserve amount as described in subsection (e)(1) - (3) of this section through the date described in subsection (f)(2) of this section through the appointment of an escrow agent as further described in subsection (b)(3) of this section.

(e) If the Department is the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section.

(1) For new construction Developments:

(A) Not less than $150 per unit per year for units one (1) to five (5) years old; and

(B) Not less than $200 per unit per year for units six (6) or more years old.

(2) For rehabilitation Developments:

(A) An amount per unit per year established by the Department's division responsible for credit underwriting based on the information presented in a Property Condition Assessment in conformance with §1.36 of this subchapter; and

(B) Not less than $300 per unit per year.

(3) For either new construction or rehabilitation Developments, the Owner of a multifamily rental housing Development shall contract for a third-party Property Condition Assessment meeting the requirements of §1.36 of this subchapter and the Department will reanalyze the annual reserve requirement based on the findings and other support documentation.

(A) A Property Condition Assessment will be conducted:

(i) At appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department; or

(ii) At least once during each five-year period beginning with the 11th year after the awarding of any financial assistance for the Development by the Department, if the Department is the First Lien Lender or the First Lien Lender does not require a third-party Property Condition Assessment.

(B) Submission by the Owner to the Department will occur within thirty (30) days of completion of the Property Condition Assessment and must include:

(i) The complete Property Condition Assessment;

(ii) First Lien Lender and/or Owner response to the findings of the Property Condition Assessment;

(iii) Documentation of repairs made as a result of the Property Condition Assessment; and

(iv) Documentation of adjustments to the amounts held in the replacement Reserve Account based upon the Property Condition Assessment.

(f) A Land Use Restriction Agreement or restrictive covenant between the Owner and the Department must require:

(1) The Owner to begin making annual deposits to the reserve account on the later of:

(A) The date that occupancy of the Development stabilizes as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date the property is at least 90% occupied; or

(B) The date that permanent financing for the Development is completely in place as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date when the permanent loan is executed and funded.

(2) The Owner to continue making deposits until the earliest of the following dates:

(A) The date on which the Owner suffers a total casualty loss with respect to the Development;

(B) The date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) The date on which the Development is demolished;

(D) The date on which the Development ceases to be used as a multifamily rental property; or

(E) The later of:

(i) The end of the affordability period specified by the Land Use Restriction Agreement or restrictive covenant; or

(ii) The end of the repayment period of the first lien loan.

(g) The duties of the Owner of a multifamily rental housing Development under this section cease on the date of a change in ownership of the Development; however, the subsequent Owner of the Development is subject to the requirements of this section.

(h) If the Department is the First Lien Lender with respect to the Development or the First Lien Lender does not require establishment of a Reserve Account, the Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet:

(1) Financial statements, audited if available, with clear identification of the replacement Reserve Account balance and all capital improvements to the Development within the fiscal year;

(2) Identification of costs other than capital improvements funded by the replacement Reserve Account; and

(3) Signed statement of cause for:

(A) Use of replacement Reserve Account for expenses other than necessary repairs, including property taxes or insurance;

(B) Deposits to the replacement Reserve Account below the Department's or First Lien Lender's mandatory levels as defined in subsections (c), (d) and (e) of this section; and

(C) Failure to make a required deposit.

(i) If a request for extension or waiver is not approved by the Department, Department action, including a penalty of up to $200 per dwelling unit in the Development and/or characterization of the Development as Materially Non-Compliant, as defined in §60.1 of this title, may be taken when:

(1) A Reserve Account, as described in this section, has not been established for the Development;

(2) The Department is not a party to the escrow agreement for the Reserve Account;

(3) Money in the Reserve Account:

(A) Is used for expenses other than necessary repairs, including property taxes or insurance; or

(B) Falls below mandatory deposit levels;

(4) Owner fails to make a required deposit;

(5) Owner fails to contract for the third party Property Condition Assessment as required under subsection (e)(3) of this section; or

(6) Owner fails to make necessary repairs, as defined in subsection (k) of this section.

(j) On a case by case basis, the Department may determine that the money in the Reserve Account may:

(1) Be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; and

(B) The funds withdrawn from the Reserve Account are replaced as cashflow after payment of expenses, but before payment of return to Owner or developer fee is available;

(2) Fall below mandatory deposit levels without resulting in Department action, if:

(A) Development income after payment of operating expenses, but before payment of return to Owner or deferred developer fee is insufficient to fund the mandatory deposit levels; and

(B) Subsequent deposits to the Reserve Account exceed mandatory deposit levels as cashflow after payment of operating expenses, but before payment of return to Owner or deferred developer fee is available until the Reserve Account has been replenished to the mandatory deposit level less capital expenses to date.

(k) The Department or its agent may make repairs to the Development if the Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by physical inspection. Repairs may be deemed necessary if the Development is notified of the Owner's failure to comply with federal, state and/or local health, safety, or building code.

(1) Payment for necessary repairs must be made directly by the Owner or through a replacement Reserve Account established for the Development under this section.

(2) The Department or its agent will produce a Request for Bids to hire a contractor to complete and oversee necessary repairs.

(l) This section does not apply to a Development for which the Owner is required to maintain a Reserve Account under any other provision of federal or state law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905346
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 9, 2009
For further information, please call: (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER C. BINGO GAMES AND EQUIPMENT

16 TAC §402.304

The Texas Lottery Commission (Commission) adopts the repeal of 16 TAC §402.304 (System Service Provider), without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6052).

The purpose of the repeal is to eliminate a rule that is no longer needed as a result of the 81st Legislature's repeal of Texas Occupations Code, Chapter 2001, Subchapter F pertaining to System Service Provider License.

A public comment hearing was held on September 17, 2009. A representative on behalf of the Bingo Interest Group was present at the public hearing and commented in favor of the repeal as proposed. The Commission received no written comments during the public comment period.

The repeal is adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905337
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: December 9, 2009
Proposal publication date: September 4, 2009
For further information, please call: (512) 344-5012

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SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.406

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §402.406 (Bingo Chairperson), without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6053).

The purpose of the amendments is to remove language that is unnecessary because it is now contained in Texas Occupations Code, §2001.002(4-a) as a result of recent legislation, House Bill 1474, which was effective October 1, 2009.

A public comment hearing was held on September 17, 2009. A representative on behalf of the Bingo Interest Group was present at the public hearing and commented in favor of the amendments as proposed. The Commission received no written comments during the public comment period.

The amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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16 TAC §402.420

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.420 (Qualifications and Requirements for Conductor's License), with changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6053). Changes were made only to correct typographical errors and provide consistency in punctuation and style throughout the rule. No substantive changes to the proposed text were made.

The purpose of the new rule is to clearly set forth the qualifications, requirements and documentation needed for an application to conduct charitable bingo. The information in the rule will help persons to understand specific qualifications, requirements, and minimum documentation necessary to obtain a license to conduct charitable bingo.

A public comment hearing was held on September 17, 2009. A representative on behalf of the Bingo Interest Group was present at the public hearing and commented in favor of the new rule as proposed. The Commission received no written comments during the public comment period.

The new rule is adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

§402.420. Qualifications and Requirements for Conductor's License.

An applicant must provide with its application documentation demonstrating that it meets all qualifications and requirements for a license to conduct bingo based on the type of organization it is. The qualifications, requirements, and necessary documentation for different types of organizations are shown in the chart below.
Figure: 16 TAC §402.420

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS

SUBCHAPTER A. OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.105

The State Board of Education (SBOE) adopts an amendment to §100.105, concerning open-enrollment charter schools. The amendment is adopted without changes to the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6981) and will not be republished. The section establishes the applicability of existing rule and statute to public senior college or university charters. The adopted amendment includes public junior colleges as potential charter holders, granted under the Texas Education Code (TEC), Chapter 12, Subchapter E, as amended by House Bill (HB) 1423, 81st Texas Legislature, 2009.

The TEC, Chapter 12, Charters, Subchapter E, College or University Charter School, was added by HB 6, 77th Texas Legislature, 2001, authorizing the SBOE to grant open-enrollment charters to public senior colleges or universities as defined in the TEC, §61.003. HB 6 required that at-risk charters be combined into one category with open-enrollment charters and limited the total number of charters to 215. In addition, HB 6 gave the SBOE authority to grant charters, outside the 215 limit, to public senior colleges or universities that met additional requirements.

HB 1423, 81st Texas Legislature, 2009, amended the TEC, Chapter 12, Subchapter E, to allow public junior colleges to be awarded charters. The adopted amendment to 19 TAC §100.105 updates the rule, including the section title, to incorporate the statutory change.

The adopted amendment will have no new procedural and reporting requirements. The adopted amendment will have no new locally maintained paperwork requirements.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved this rule action for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2010-2011 school year. The earlier effective date is necessary to provide opportunity for public junior colleges to apply for charters as soon as possible and begin operating as early as the 2010-2011 school year. The effective date is 20 days after filing as adopted.

No public comments were received on the proposal.

The amendment is adopted under the Texas Education Code, §12.152, which authorizes the SBOE to grant a charter on the application of a public senior college or university or a public junior college for an open-enrollment charter school, and §12.154, which authorizes the SBOE to grant a charter to a public senior college or university or a public junior college if the entity satisfies specific criteria in the application, as determined by the SBOE.

The amendment implements the Texas Education Code, §12.152 and §12.154.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905409
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: December 13, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §281.65, §281.66

The Texas State Board of Pharmacy adopts amendments to §281.65 concerning Schedule of Administrative Penalties and §281.66 concerning Application for Reissuance or Removal of Restrictions of a License or Registration. The amendments are adopted without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6791).

The amendments clarify that violating a contract with a program to aid impaired pharmacists or pharmacy students may result in an administrative penalty and that individuals applying for reinstatement or removal of restrictions may be required to submit fingerprints as required for criminal background checks.

No comments were received.

The amendments are adopted under §551.002, and §554.051, of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905287
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 6, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-8028

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CHAPTER 291. PHARMACIES

SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.8, §291.28

The Texas State Board of Pharmacy adopts amendments to §291.8 concerning Return of Prescription Drugs and §291.28 concerning Patient Access to Confidential Records. The amendments are adopted without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6792).

The amendments clarify that the signature of a licensed health care professional is required on the inventory of drugs returned

to a pharmacy from a penal institution; and clarify the requirements regarding the access to confidential patient records, increase the maximum fee to be charged for copying records from $25 to $50, allow a charge of up to $50 for completing a survey or questionnaire, and change the title of the section to Access to Confidential Records.

No comments were received.

The amendments are adopted under §§551.002, 554.051, and 562.1085, of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.1085 as authorizing the agency to adopt rules allowing a consultant pharmacist or licensed healthcare professional return certain unused drugs from a healthcare facility or penal institution.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 6, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-8028

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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §§291.31, 291.33, 291.34

The Texas State Board of Pharmacy adopts amendments to §291.31 concerning Definitions, §291.33 concerning Operational Standards, and §291.34 concerning Records. The amendments to §291.31 and §291.34 are adopted without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6794). The amendments to §291.33 are adopted with changes to the proposed text as noted below.

The amendments implement the provisions of HB 19 passed during the 81st Regular Session of the Texas Legislature and require pharmacists to place a beyond use date on the prescription label in class A pharmacies; and implement the provisions of SB 381 as passed by the 81st Texas Legislature which amends Chapter 157 of the Medical Practices Act to allow a physician to delegate to a pharmacist the authority to implement or modify a patient's drug therapy under a protocol, including the authority to sign a prescription drug order for dangerous drugs. The Board included an effective date of June 1, 2010, for Class A pharmacies to begin placing a beyond use date on the prescription label.

No comments were received.

The amendments are adopted under §§551.002, 554.051, 562.006, 562.0061, and 554.057 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.006 and §562.0061 as authorizing the agency to adopt rules regarding the prescription label. The Board interprets §554.057 as authorizing the agency, with the advice of the Texas Medical Board, to adopt rules that allow a pharmacist to implement or modify a patient's drug therapy and sign prescriptions for dangerous drugs pursuant to a physician's delegation under §157.101(b-1).

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(3) A Class A pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.3 of this title.

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title.

(5) A Class A pharmacy shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(6) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A Class A pharmacy, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2) concerning Nuclear Pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class A (community) pharmacy engaged in the compounding of non-sterile pharmaceuticals shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(10) A Class A (community) pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(11) A Class A (Community) pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(12) Class A (Community) pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Centralized Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(b) Environment.

(1) General requirements.

(A) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A Class A pharmacy shall have a sink with hot and cold running water within the pharmacy, exclusive of restroom facilities, available to all pharmacy personnel and maintained in a sanitary condition.

(C) A Class A pharmacy which serves the general public shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall:

(I) be easily accessible to both patient and pharmacists and not allow patient access to prescription drugs;

(II) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(D) The pharmacy shall be properly lighted and ventilated.

(E) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs; the temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(F) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(2) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key, combination or other mechanical or electronic means to prohibit unauthorized access when a pharmacist is not on-site except as provided in subparagraphs (C) and (D) of this paragraph and paragraph (3) of this subsection. The following is applicable:

(i) If the prescription department is closed at any time when the rest of the facility is open, the prescription department must be physically or electronically secured. The security may be accomplished by means such as floor to ceiling walls; walls, partitions, or barriers at least 9 feet 6 inches high; electronically monitored motion detectors; pull down sliders; or other systems or technologies that will secure the pharmacy from unauthorized entrance when the pharmacy is closed. Pharmacies licensed prior to June 1, 2009, shall be exempt from this provision unless the pharmacy changes location. Change of location shall include the relocation of the pharmacy within the licensed address. A pharmacy licensed prior to June 1, 2009 that files a change of ownership but does not change location shall be exempt from the provisions.

(ii) Effective, June 1, 2009, the pharmacy's key, combination, or other mechanical or electronic means of locking the pharmacy may not be duplicated without the authorization of the pharmacist-in-charge or owner.

(iii) Effective, June 1, 2009, at a minimum, the pharmacy must have a basic alarm system with off-site monitoring and perimeter and motion sensors. The pharmacy may have additional security by video surveillance camera systems.

(C) Prior to authorizing individuals to enter the prescription department, the pharmacist-in-charge or owner may designate persons who may enter the prescription department to perform functions, other than dispensing functions or prescription processing, documented by the pharmacist-in-charge including access to the prescription department by other pharmacists, pharmacy personnel and other individuals. The pharmacy must maintain written documentation of authorized individuals other than individuals employed by the pharmacy who accessed the prescription department when a pharmacist is not on-site.

(D) Only persons designated either by name or by title including such titles as "relief" or "floater" pharmacist, in writing by the pharmacist-in-charge may unlock the prescription department except in emergency situations. An additional key to or instructions on accessing the prescription department may be maintained in a secure location outside the prescription department for use during an emergency or as designated by the pharmacist-in-charge for entry by another pharmacist.

(E) Written policies and procedures for the pharmacy's security shall be developed and implemented by the pharmacist-in-charge and/or the owner of the pharmacy. Such polices and procedures may include quarterly audits of controlled substances commonly abused or diverted; perpetual inventories for the comparison of the receipt, dispensing, and distribution of controlled substances; monthly reports from the pharmacy's wholesaler(s) of controlled substances purchased by the pharmacy; opening and closing procedures; product storage and placement; and central management oversight.

(3) Temporary absence of pharmacist.

(A) On-site supervision by pharmacist.

(i) If a pharmacy is staffed by only one pharmacist, the pharmacist may leave the prescription department for short periods of time without closing the prescription department and removing pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department provided the following conditions are met:

(I) at least one pharmacy technician remains in the prescription department;

(II) the pharmacist remains on-site at the licensed location of the pharmacy and is immediately available;

(III) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department during his or her absence; and

(IV) a notice is posted which includes the following information:

(-a-) the pharmacist is on a break and the time the pharmacist will return; and

(-b-) pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist's absence, but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist verifies the accuracy of the prescription.

(ii) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container; and

(VI) prepackaging and labeling prepackaged drugs.

(iii) Upon return to the prescription department, the pharmacist shall:

(I) conduct a drug regimen review as specified in subsection (c)(2) of this section; and

(II) verify the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(iv) An agent of the pharmacist may deliver a previously verified prescription to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(vi) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a registered pharmacy technician and may perform only the duties of a registered pharmacy technician.

(vii) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(B) Pharmacist is off-site.

(i) The prescription department must be secured with procedures for entry during the time that a pharmacy is not under the continuous on-site supervision of a pharmacist and the pharmacy is not open for pharmacy services.

(ii) Pharmacy technicians and pharmacy technician trainees may not perform any duties of a pharmacy technician or pharmacy technician trainee during the time that the pharmacist is off-site.

(iii) A pharmacy may use an automated storage and distribution device as specified in subsection (i) of this section for pick-up of a previously verified prescription by a patient or patient's agent, provided the following conditions are met:

(I) a notice is posted which includes the following information:

(-a-) the pharmacist is off-site and not present in the pharmacy;

(-b-) no new prescriptions may be prepared at the pharmacy but previously verified prescriptions may be delivered to the patient or the patient's agent; and

(-c-) the date/time when the pharmacist will return.

(II) the pharmacy must maintain documentation of the absences of the pharmacist(s); and

(III) the prescription department is locked and secured to prohibit unauthorized entry.

(iv) An agent of the pharmacist may deliver a previously verified prescription to a patient or patient's agent during short periods of time when a pharmacist is off-site, provided the following conditions are met:

(I) short periods of time may not exceed two consecutive hours in a 24 hour period;

(II) a notice is posted which includes the following information:

(-a-) the pharmacist is off-site and not present in the pharmacy;

(-b-) no new prescriptions may be prepared at the pharmacy but previously verified prescriptions may be delivered to the patient or the patient's agent; and

(-c-) the date/time when the pharmacist will return.

(III) the pharmacy must maintain documentation of the absences of the pharmacist(s); and

(IV) the prescription department is locked and secured to prohibit unauthorized entry.

(v) During the time a pharmacist is absent from the prescription department and is off-site, a record of prescriptions delivered must be maintained and contain the following information:

(I) date and time of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(vi) Any prescription delivered to a patient when a pharmacist is not on-site at the pharmacy must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) the name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication:

(i) shall be provided with each new prescription drug order;

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication;

(iv) effective, June 1, 2010, shall be documented by recording the initials or identification code of the pharmacist providing the counseling in the prescription dispensing record on either the original hard-copy prescription. in the pharmacy's data processing system or in an electronic logbook; and

(v) shall be reinforced with written information relevant to the prescription and provided to the patient or patient's agent. The following is applicable concerning this written information.

(I) Written information must be in plain language designed for the consumer and printed in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(C) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(3) of this section.

(ii) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in subparagraph (F) of this paragraph.

(iii) A Class A pharmacy shall make available for use by the public a current or updated edition of the United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient), or another source of such information designed for the consumer.

(F) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable.

(i) The information specified in subparagraph (A) of this paragraph shall be delivered with the dispensed prescription in writing.

(ii) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(iii) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(iv) The pharmacy shall maintain and use adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(v) The pharmacy shall use a delivery system which is designed to assure that the drugs are delivered to the appropriate patient.

(G) Except as specified in subparagraph (B) of this paragraph, in the best interest of the public health and to optimize drug therapy, upon delivery of a refill prescription, a pharmacist shall ensure that the patient or patient's agent is offered information about the refilled prescription. Either a pharmacist or other pharmacy personnel shall inform the patient or patient's agent that a pharmacist is available to discuss the patient's prescription and provide information.

(H) A pharmacy shall post a sign no smaller than 8.5 inches by 11 inches in clear public view at all locations in the pharmacy where a patient may pick up prescriptions. The sign shall contain the following statement in a font that is easily readable: "Do you have questions about your prescription? Ask the pharmacist." Such notification shall be in both English and Spanish.

(I) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(I) known allergies;

(II) rational therapy-contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions; and

(X) proper utilization, including overutilization or underutilization.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practices;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(3) Generic Substitution.

(A) General requirements.

(i) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:

(I) the generic product costs the patient less than the prescribed drug product;

(II) the patient does not refuse the substitution; and

(III) the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subparagraph (C) of this paragraph.

(ii) If the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner and notes such authorization on the original prescription drug order.

(B) Prescription format for written prescription drug orders.

(i) A written prescription drug order issued in Texas may:

(I) be on a form containing a single signature line for the practitioner; and

(II) contain the following reminder statement on the face of the prescription: "A generically equivalent drug product may be dispensed unless the practitioner hand writes the words 'Brand Necessary' or 'Brand Medically Necessary' on the face of the prescription."

(ii) A pharmacist may dispense a prescription that is not issued on the form specified in clause (i) of this subparagraph, however, the pharmacist may dispense a generically equivalent drug product unless the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C)(i) of this paragraph.

(iii) The prescription format specified in clause (i) of this subparagraph does not apply to the following types of prescription drug orders:

(I) prescription drug orders issued by a practitioner in a state other than Texas;

(II) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(III) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(iv) In the event of multiple prescription orders appearing on one prescription form, the practitioner shall clearly identify to which prescription(s) the dispensing directive(s) apply. If the practitioner does not clearly indicate to which prescription(s) the dispensing directive(s) apply, the pharmacist may substitute on all prescriptions on the form.

(C) Dispensing directive.

(i) Written prescriptions.

(I) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."

(II) The dispensing directive shall:

(-a-) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. §1181 et seq.) and its subsequent amendments; and

(-b-) comply with federal and state law, including rules, with regard to formatting and security requirements.

(III) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.

(IV) A practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.

(ii) Verbal Prescriptions.

(I) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subparagraph (B)(i) of this paragraph, or any other format that clearly indicates the substitution instructions.

(II) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:

(-a-) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and

(-b-) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in clause (i) of this subparagraph within 30 days.

(iii) Electronic prescription drug orders.

(I) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" on the electronic prescription drug order.

(II) If the practitioner or practitioner's agent does not clearly indicate on the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in clause (i) of this subparagraph within 30 days.

(iv) Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.

(I) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:

(-a-) prescription drug orders issued by a practitioner in a state other than Texas;

(-b-) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(-c-) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(II) A pharmacist may not substitute on prescription drug orders identified in subclause (I) of this clause unless the practitioner has authorized substitution on the prescription drug order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:

(-a-) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or

(-b-) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.

(-1-) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.

(-2-) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.

(-3-) Such documentation shall be updated yearly.

(D) Refills.

(i) Original substitution instructions. All refills, including prescriptions issued prior to June 1, 2001, shall follow the original substitution instructions or dispensing directive, unless otherwise indicated by the practitioner or practitioner's agent.

(ii) Narrow therapeutic index drugs.

(I) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code.

(-a-) The board has specified in §309.7 of this title (relating to Dispensing Responsibilities) that for drugs listed in the publication, pharmacists shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication. Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(-b-) Practitioners may prohibit substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph.

(II) The board shall reconsider the contents of the list if the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products.

(4) Substitution of dosage form.

(A) As specified in §562.002 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as a tablet instead of a capsule or liquid instead of tablets, provided:

(i) the patient consents to the dosage form substitution;

(ii) the pharmacist notifies the practitioner of the dosage form substitution; and

(iii) the dosage form so dispensed:

(I) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(II) is not an enteric-coated or time release product;

(III) does not alter desired clinical outcomes;

(B) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(5) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This paragraph does not apply to generic substitution. For generic substitution, see the requirements of paragraph (3) of this subsection.

(A) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(i) a description of the change;

(ii) the reason for the change;

(iii) whom to notify with questions concerning the change; and

(iv) instructions for return of the drug if not wanted by the patient.

(B) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(i) the date of the notification;

(ii) the method of notification;

(iii) a description of the change; and

(iv) the reason for the change.

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be reused. However, if a patient or patient's agent has difficulty reading or understanding a prescription label, a prescription container may be reused provided:

(i) the container is designed to provide audio-recorded information about the proper use of the prescription medication;

(ii) the container is reused for the same patient;

(iii) the container is cleaned; and

(iv) a new safety closure is used each time the prescription container is reused.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size, unless otherwise specified, with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(vii) instructions for use that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(viii) quantity dispensed;

(ix) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(x) if the prescription is for a Schedules II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xi) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xii) the name of the advanced practice nurse or physician assistant, if the prescription is carried out or signed by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code;

(xiii) the name of the pharmacist who signed the prescription for a dangerous drug under delegated authority of a physician as specified in Subtitle B, Chapter 157, Occupations Code;

(xiv) the name and strength of the actual drug product dispensed that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman, unless otherwise directed by the prescribing practitioner; and

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic name and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug products having no brand name, the principal active ingredients shall be indicated on the label.)

(II) Except as provided in clause (xi) of this subparagraph, the brand name of the prescribed drug shall not appear on the prescription container label unless it is the drug product actually dispensed.

(xv) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer's original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacture, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication.

(B) If the prescription label required in subparagraph (A) of this paragraph is printed in a type size smaller than ten-point Times Roman, the pharmacy shall provide the patient written information containing the information specified in subparagraph (A) of this paragraph in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(C) The label is not required to include the initials or identification code of the dispensing pharmacist specified in subparagraph (A) of this paragraph if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(D) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient; and

(-e-) name of the prescribing practitioner and, if applicable, the name of the advanced practice nurse or physician assistant who signed the prescription drug order;

(II) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer's original container, specifies the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacture, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(d) Equipment and supplies. Class A pharmacies dispensing prescription drug orders shall have the following equipment and supplies:

(1) data processing system including a printer or comparable equipment;

(2) refrigerator;

(3) adequate supply of child-resistant, light-resistant, tight, and if applicable, glass containers;

(4) adequate supply of prescription, poison, and other applicable labels;

(5) appropriate equipment necessary for the proper preparation of prescription drug orders; and

(6) metric-apothecary weight and measure conversion charts.

(e) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and rules; and

(D) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(2) at least one current or updated reference from each of the following categories:

(A) patient information:

(i) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(ii) a reference text or information leaflets which provide patient information;

(B) drug interactions: a reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(C) a general information reference text, such as:

(i) Facts and Comparisons with current supplements;

(ii) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(iii) Clinical Pharmacology;

(iv) American Hospital Formulary Service with current supplements; or

(v) Remington's Pharmaceutical Sciences; and

(3) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Drugs.

(1) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices and nonprescription Schedule V controlled substances shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined in the USP/NF and §291.15 of this title (relating to Storage of Drugs).

(2) Out-of-date drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(3) Nonprescription Schedule V controlled substances.

(A) Schedule V controlled substances containing codeine, dihydrocodeine, or any of the salts of codeine or dihydrocodeine may not be distributed without a prescription drug order from a practitioner.

(B) A pharmacist may distribute nonprescription Schedule V controlled substances which contain no more than 15 milligrams of opium per 29.5729 ml or per 28.35 Gm provided:

(i) such distribution is made only by a pharmacist; a nonpharmacist employee may not distribute a nonprescription Schedule V controlled substance even if under the supervision of a pharmacist; however, after the pharmacist has fulfilled professional and legal responsibilities, the actual cash, credit transaction, or delivery may be completed by a nonpharmacist:

(ii) not more than 240 ml (eight fluid ounces), or not more than 48 solid dosage units of any substance containing opium, may be distributed to the same purchaser in any given 48-hour period without a prescription drug order;

(iii) the purchaser is at least 18 years of age; and

(iv) the pharmacist requires every purchaser not known to the pharmacist to furnish suitable identification (including proof of age where appropriate).

(C) A record of such distribution shall be maintained by the pharmacy in a bound record book. The record shall contain the following information:

(i) true name of the purchaser;

(ii) current address of the purchaser;

(iii) name and quantity of controlled substance purchased;

(iv) date of each purchase; and

(v) signature or written initials of the distributing pharmacist.

(4) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(A) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(B) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(C) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(D) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by supportive personnel under the direction and direct supervision of a pharmacist.

(2) The label of a prepackaged unit shall indicate:

(A) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(B) facility's lot number;

(C) expiration date; and

(D) quantity of the drug, if the quantity is greater than one.

(3) Records of prepackaging shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) facility's lot number;

(C) manufacturer or distributor;

(D) manufacturer's lot number;

(E) expiration date;

(F) quantity per prepackaged unit;

(G) number of prepackaged units;

(H) date packaged;

(I) name, initials, or electronic signature of the prepacker; and

(J) signature, or electronic signature of the responsible pharmacist.

(4) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(h) Customized patient medication packages.

(1) Purpose. In lieu of dispensing two or more prescribed drug products in separate containers, a pharmacist may, with the consent of the patient, the patient's caregiver, or the prescriber, provide a customized patient medication package (patient med-pak).

(2) Definition. A patient med-pak is a package prepared by a pharmacist for a specific patient comprising a series of containers and containing two or more prescribed solid oral dosage forms. The patient med-pak is so designed or each container is so labeled as to indicate the day and time, or period of time, that the contents within each container are to be taken.

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the date of preparation of the patient med-pak and the beyond-use date assigned to the patient med-pak (which such beyond-use date shall not be later than 60 days from the date of preparation);

(ix) the name, address, and telephone number of the pharmacy;

(x) the initials or an identification code of the dispensing pharmacist;

(xi) effective June 1, 2010, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacture, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pack if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(xii) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of each drug product dispensed;

(-d-) name of the patient; and

(-e-) name of the prescribing practitioner of each drug product and if applicable, the name of the advanced practice nurse or physician assistant who signed the prescription drug order;

(II) effective June 1, 2010, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacture, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pack if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) for each drug product sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(4) Labeling. The patient med-pak shall be accompanied by a patient package insert, in the event that any drug contained therein is required to be dispensed with such insert as accompanying labeling. Alternatively, such required information may be incorporated into a single, overall educational insert provided by the pharmacist for the total patient med-pak.

(5) Packaging. In the absence of more stringent packaging requirements for any of the drug products contained therein, each container of the patient med-pak shall comply with official packaging standards. Each container shall be either not reclosable or so designed as to show evidence of having been opened.

(6) Guidelines. It is the responsibility of the dispensing pharmacist when preparing a patient med-pak, to take into account any applicable compendial requirements or guidelines and the physical and chemical compatibility of the dosage forms placed within each container, as well as any therapeutic incompatibilities that may attend the simultaneous administration of the drugs.

(7) Recordkeeping. In addition to any individual prescription filing requirements, a record of each patient med-pak shall be made and filed. Each record shall contain, as a minimum:

(A) the name and address of the patient;

(B) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(C) the name of the manufacturer or distributor and lot number for each drug product contained therein;

(D) information identifying or describing the design, characteristics, or specifications of the patient med-pak sufficient to allow subsequent preparation of an identical patient med-pak for the patient;

(E) the date of preparation of the patient med-pak and the beyond-use date that was assigned;

(F) any special labeling instructions; and

(G) the initials or an identification code of the dispensing pharmacist.

(8) The patient med-pak label is not required to include the initials or identification code of the dispensing pharmacist specified in paragraph (3)(A) of this subsection if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(i) Automated devices and systems.

(1) Automated compounding or counting devices. If a pharmacy uses automated compounding or counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated compounding or counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk or unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist;

(C) the label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk or unlabeled drugs into an automated compounding or counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated compounding or counting device; and

(vii) signature or electronic signature of the responsible pharmacist; and

(E) the automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature to the record specified in subparagraph (D) of this paragraph.

(2) Automated pharmacy dispensing systems. This paragraph becomes effective September 1, 2000.

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a written program for quality assurance of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least ev-

ery six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated pharmacy dispensing system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(III) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(IV) require prior to use, that a pharmacist checks, verifies, and documents that the automated pharmacy dispensing system has been accurately filled each time the system is stocked;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(VI) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Recovery Plan. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board, each patient of the pharmacy, and other appropriate agencies whenever an automated pharmacy dispensing system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) Final check of prescriptions dispensed using an automated pharmacy dispensing system. For the purpose of §291.32(b)(2) of this title (relating to Personnel), a pharmacist must perform the final check of all prescriptions prior to delivery to the patient to ensure that the prescription is dispensed accurately as prescribed.

(A) This final check shall be considered accomplished if:

(i) a check of the final product is conducted by a pharmacist after the automated system has completed the prescription and prior to delivery to the patient; or

(ii) the following checks are conducted by a pharmacist:

(I) if the automated pharmacy dispensing system contains bulk stock drugs, a pharmacist verifies that those drugs have been accurately stocked as specified in paragraph (2)(C)(i)(IV) of this subsection; and

(II) a pharmacist checks the accuracy of the data entry of each original or new prescription drug order entered into the automated pharmacy dispensing system.

(B) If the final check is accomplished as specified in subparagraph (A)(ii) of this paragraph, the following additional requirements must be met.

(i) The dispensing process must be fully automated from the time the pharmacist releases the prescription to the automated system until a completed, labeled prescription ready for delivery to the patient is produced.

(ii) The pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated pharmacy dispensing system dispenses accurately as specified in paragraph (2)(A) and (B) of this subsection.

(iii) The automated pharmacy dispensing system documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(ii) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the dispensing process.

(iv) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every month rather than every six months as specified in paragraph (2)(B) of this subsection.

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after dispensing but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) For the purpose of §291.32(b)(2) of this title, the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new prescription drug order.

(ii) the prescription is dispensed, labeled, and made ready for delivery to the patient in compliance with Class A (Community) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the prescription has been dispensed safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who perform any other portion of the dispensing process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

(5) Automated storage and distribution device. A pharmacy may use an automated storage and distribution device to deliver a previously verified prescription to a patient or patient's agent when the pharmacy is open or when the pharmacy is closed as specified in subsection (b)(3)(B)(iii) of this section, provided:

(A) the device is used to deliver refills of prescription drug orders and shall not be used to deliver new prescriptions as defined by §291.31(26) of this title (Relating to Definitions);

(B) the automated storage and distribution device may not be used to deliver a controlled substance;

(C) drugs stored in the automated storage and distribution device are stored at proper temperatures;

(D) the patient or patient's agent is given the option to use the system;

(E) the patient or patient's agent has access to a pharmacist for questions regarding the prescription at the pharmacy where the automated storage and distribution device is located, by a telephone available at the pharmacy that connects directly to another pharmacy, or by a telephone available at the pharmacy and a posted telephone number to reach another pharmacy;

(F) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(G) the automated storage and distribution device has been tested by the pharmacy and found to dispense prescriptions accurately. The pharmacy shall make the results of such testing available to the board upon request;

(H) the automated storage and distribution device may be loaded with previously verified prescriptions only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist;

(I) the pharmacy will make the automated storage and distribution device available for inspection by the board;

(J) the automated storage and distribution device is located within the pharmacy building whereby pharmacy staff has access to the device from within the prescription department and patients have access to the device from outside the prescription department. The device may not be located on an outside wall of the pharmacy and may not be accessible from a drive-thru;

(K) the automated storage and distribution device is secure from access and removal of prescription drug orders by unauthorized individuals;

(L) the automated storage and distribution device has adequate security system to prevent unauthorized access and to maintain patient confidentiality; and

(M) the automated storage and distribution device records a digital image of the individual accessing the device to pick-up a prescription and such record is maintained by the pharmacy for two years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy adopts amendments to §291.104 concerning Operational Standards. The amendments are adopted with changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6799) as noted below.

The amendments implement the provisions of HB 19 passed during the 81st Regular Session of the Texas Legislature and require pharmacists to place a beyond use date on the prescription label in class E pharmacies. The Board included an effective date of June 1, 2010, for Class E pharmacies to begin placing a beyond use date on the prescription label.

No comments were received.

The amendments are adopted under §§551.002, 554.051, 562.006, and 562.0061 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the

public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.006 and §562.0061 as authorizing the agency to adopt rules regarding the prescription label.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.104. Operational Standards.

(a) Licensing requirements.

(1) A Class E pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board.

(2) On initial application, the pharmacy shall follow the procedures specified in §291.1 of this title (relating to Pharmacy License Application) and the provide the following additional information specified in §560.052(c) and (f) of the Act (relating to Qualifications):

(A) evidence that the applicant holds a pharmacy license, registration, or permit issued by the state in which the pharmacy is located;

(B) the name of the owner and pharmacist-in-charge of the pharmacy for service of process;

(C) evidence of the applicant's ability to provide to the board a record of a prescription drug order dispensed by the applicant to a resident of this state not later than 72 hours after the time the board requests the record;

(D) an affidavit by the pharmacist-in-charge which states that the pharmacist has read and understands the laws and rules relating to a Class E pharmacy;

(E) proof of creditworthiness; and

(F) an inspection report issued not more than two years before the date the license application is received and conducted by the pharmacy licensing board in the state of the pharmacy's physical location.

(i) A Class E pharmacy may submit an inspection report issued by an entity other than the pharmacy licensing board of the state in which the pharmacy is physically located if the state's licensing board does not conduct inspections as follows:

(I) an individual approved by the board who is not employed by the pharmacy but acting as a consultant to inspect the pharmacy;

(II) an agent of the National Association of Boards of Pharmacy;

(III) an agent of another State Board of Pharmacy; or

(IV) an agent of an accrediting body, such as the Joint Commission on Accreditation of Healthcare Organizations.

(ii) The inspection must be substantively equivalent to an inspection conducted by the board.

(3) On renewal of a license, the pharmacy shall complete the renewal application provided by the board and, as specified in §561.031 of the Act, provide an inspection report issued not more than three years before the date the renewal application is received and conducted by the pharmacy licensing board in the state of the pharmacy's physical location.

(A) A Class E pharmacy may submit an inspection report issued by an entity other than the pharmacy licensing board of the state in which the pharmacy is physically located if the state's licensing board does not conduct inspections as follows:

(i) an individual approved by the board who is not employed by the pharmacy but acting as a consultant to inspect the pharmacy;

(ii) an agent of the National Association of Boards of Pharmacy;

(iii) an agent of another State Board of Pharmacy; or

(iv) an agent of an accrediting body, such as the Joint Commission on Accreditation of Healthcare Organizations.

(B) The inspection must be substantively equivalent to an inspection conducted by the board.

(4) A Class E pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(5) A Class E pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.3 of this title.

(6) A Class E pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title.

(7) A Class E pharmacy shall notify the board in writing within ten days of closing.

(8) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(9) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(10) The board may grant an exemption from the licensing requirements of this Act on the application of a pharmacy located in a state of the United States other than this state that restricts its dispensing of prescription drugs or devices to residents of this state to isolated transactions.

(11) A Class E pharmacy engaged in the centralized dispensing of prescription drug or medication orders shall comply with the provisions of §291.125 of this title (relating to Centralized Prescription Dispensing).

(12) A Class E pharmacy engaged in central processing of prescription drug or medication orders shall comply with the provisions of §291.123 of this title (relating to Central Prescription or Medication Order Processing).

(13) A Class E (Non-Resident) pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(14) A Class E (Non-Resident) pharmacy engaged in the compounding of sterile preparations shall comply with the provisions of §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(b) Prescription dispensing and delivery.

(1) General.

(A) All prescription drugs and/or devices shall be dispensed and delivered safely and accurately as prescribed.

(B) The pharmacy shall maintain adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of packaging material and devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(C) The pharmacy shall utilize a delivery system which is designed to assure that the drugs are delivered to the appropriate patient.

(D) All pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(E) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship.

(F) Subparagraph (E) of this paragraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking calls for the patient's regular practitioner).

(2) Drug regimen review.

(A) For the purpose of promoting therapeutic appropriateness, a pharmacist shall prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(i) inappropriate drug utilization;

(ii) therapeutic duplication;

(iii) drug-disease contraindications;

(iv) drug-drug interactions;

(v) incorrect drug dosage or duration of drug treatment;

(vi) drug-allergy interactions; and

(vii) clinical abuse/misuse.

(B) Upon identifying any clinically significant conditions, situations, or items listed in subparagraph (A) of this paragraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(3) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) the name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication:

(i) shall be provided with each new prescription drug order;

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(iv) shall be reinforced with written information. The following is applicable concerning this written information:

(I) Written information designed for the consumer, such as the USP DI patient information leaflets, shall be provided.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(C) Only a pharmacist may orally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(E) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(F) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(G) Upon delivery of a refill prescription, a pharmacist shall ensure that the patient or patient's agent is offered information about the refilled prescription and that a pharmacist is available to discuss the patient's prescription and provide information.

(H) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(4) Labeling. At the time of delivery, the dispensing container shall bear a label that contains the following information:

(A) the name, physical address, and phone number of the pharmacy,

(B) effective June 1, 2010, if the drug is dispensed in a container other than the manufacturer's original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacture, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(C) any other information that is required by the pharmacy or drug laws or rules in the state in which the pharmacy is located.

(c) Generic Substitution. Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located:

(1) a pharmacist in a Class E pharmacy may dispense a generically equivalent drug product if:

(A) the generic product costs the patient less than the prescribed drug product;

(B) the patient does not refuse the substitution; and

(C) the prescribing practitioner authorizes the substitution of a generically equivalent product; or

(D) the practitioner or practitioner's agent does not clearly indicate that the oral or electronic prescription drug order shall be dispensed as ordered; and

(2) Pharmacists shall use as a basis for the determination of generic equivalency as defined in the Subchapter A, Chapter 562 of the Act, the following.

(A) For drugs listed in the publication, pharmacists shall use Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book) and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication, to determine generic equivalency. Pharmacists may only substitute products that are rated therapeutically equivalent in the Orange Book and have an "A" rating. "A" rated drug products include but are not limited to, those designated AA, AB, AN, AO, AP, or AT in the Orange Book.

(B) For drugs not listed in the Orange Book, pharmacists shall use their professional judgment to determine generic equivalency.

(3) The pharmacy must include on the prescription order form completed by the patient or the patient's agent information that clearly and conspicuously:

(A) states that if a less expensive generically equivalent drug is available for the brand prescribed, the patient or the patient's agent may choose between the generically equivalent drug and the brand prescribed; and

(B) allows the patient or the patient's agent to indicate the choice of the generically equivalent drug or the brand prescribed.

(d) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This subsection does not apply to generic substitution. For generic substitution, see the requirements of subsection (c) of this section.

(1) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(A) a description of the change;

(B) the reason for the change;

(C) whom to notify with questions concerning the change; and

(D) instructions for return of the drug if not wanted by the patient.

(2) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(A) the date of the notification;

(B) the method of notification;

(C) a description of the change; and

(D) the reason for the change.

(e) Transfer of Prescription Drug Order Information. Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located, a pharmacist in a Class E pharmacy may not refuse to transfer prescriptions to another pharmacy that is making the transfer request on behalf of the patient.

(f) Prescriptions for Schedule II controlled substances. Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located, a pharmacist in a Class E pharmacy who dispenses a prescription for a Schedule II controlled substance issued on a Texas Official Prescription Form shall:

(1) mail a copy of the form to the Texas Department of Public Safety, Electronic Prescription Section, P.O. Box 4087, Austin, Texas 78773 within 30 days of dispensing; or

(2) electronically send the prescription information to the Texas Department of Public Safety per their requirements for electronic submissions within 30 days of dispensing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.133

The Texas State Board of Pharmacy adopts amendments to §291.133, concerning Pharmacies Compounding Sterile Preparations. The amendments are adopted with changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6800).

The amendments implement adopted amendments to the USP, Chapter 797 Pharmaceutical Compounding--Sterile Preparations that became effective on June 1, 2008 and were recommended by the Task Force on Class C Pharmacies.

Written comments were received from Omnicare of Houston. The comments requested that the requirements for a hands free sink remain an option and the exclusions permitted by USP 797 for hazardous preparations be permitted. The Board disagrees with these comments. The requirements for a hands free sink and regarding hazardous preparations are not new and have been in place for some time. The requirements are needed to provide safety to the public.

The amendments are adopted under §551.002, §554.051, of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.133. Pharmacies Compounding Sterile Preparations.

(a) Purpose. Pharmacies compounding sterile preparations, prepackaging pharmaceutical products, and distributing those products shall comply with all requirements for their specific license classification and this section. The purpose of this section is to provide standards for the:

(1) compounding of sterile preparations pursuant to a prescription or medication order for a patient from a practitioner in Class A (Community), Class C (Institutional), and Class E (Non-resident) pharmacies;

(2) compounding, dispensing, and delivery of a reasonable quantity of a compounded sterile preparation in a Class A (Community), Class C (Institutional), and Class E (Non-resident) pharmacies to a practitioner's office for office use by the practitioner;

(3) compounding and distribution of compounded sterile preparations by a Class A (Community) pharmacy for a Class C (Institutional) pharmacy; and

(4) compounding of sterile preparations by a Class C (Institutional) pharmacy and the distribution of the compounded preparations to other Class C (Institutional) pharmacies under common ownership.

(b) Definitions. In addition to the definitions for specific license classifications, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ACPE--Accreditation Council for Pharmacy Education.

(2) Airborne particulate cleanliness class--The level of cleanliness specified by the maximum allowable number of particles per cubic meter of air as specified in the International Organization of Standardization (ISO) Classification Air Cleanliness (ISO 14644-1). For example:

(A) ISO Class 5 (formerly Class 100) is an atmospheric environment that contains less than 3,520 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 100 particles 0.5 microns in diameter per cubic foot of air);

(B) ISO Class 7 (formerly Class 10,000) is an atmospheric environment that contains less than 352,000 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 10,000 particles 0.5 microns in diameter per cubic foot of air); and

(C) ISO Class 8 (formerly Class 100,000) is an atmospheric environment that contains less than 3,520,000 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 100,000 particles 0.5 microns in diameter per cubic foot of air).

(3) Ancillary supplies--Supplies necessary for the preparation and administration of compounded sterile preparations.

(4) Anteroom--An ISO Class 8 or better area where personnel may perform hand hygiene and garbing procedures, staging of components, order entry, labeling, and other high-particulate generating activities. It is also a transition area that:

(A) provides assurance that pressure relationships are constantly maintained so that air flows from clean to dirty areas; and

(B) reduces the need for the heating, ventilating and air conditioning (HVAC) control system to respond to large disturbances.

(5) Aseptic Processing--The technique involving procedures designed to preclude contamination of drugs, packaging, equipment, or supplies by microorganisms during preparation.

(6) Automated compounding device--An automated device that compounds, measures, and/or packages a specified quantity of individual components in a predetermined sequence for a designated sterile preparation.

(7) Batch--A specific quantity of a drug or other material that is intended to have uniform character and quality, within specified limits, and is produced during a single preparation cycle.

(8) Batch preparation compounding--Compounding of multiple sterile preparation units, in a single discrete process, by the same individual(s), carried out during one limited time period. Batch preparation/compounding does not include the preparation of multiple sterile preparation units pursuant to patient specific medication orders.

(9) Beyond-use date--The date or time after which the compounded sterile preparation shall not be stored or transported or begin to be administered to a patient. The beyond-use date is determined from the date or time the preparation is compounded.

(10) Biological Safety Cabinet, Class II--A ventilated cabinet for personnel, product, and environmental protection having an

open front with inward airflow for personnel protection, downward HEPA filtered laminar airflow for product protection, and HEPA filtered exhausted air for environmental protection.

(11) Buffer Area, Buffer or Core Room, Buffer or Clean Room Areas, Buffer Room Area, Buffer or Clean Area, or Buffer Zone--An ISO Class 7 area where the primary engineering control area is physically located. Activities that occur in this area include the preparation and staging of components and supplies used when compounding sterile preparations.

(12) Clean room or controlled area--A room in which the concentration of airborne particles is controlled to meet a specified airborne particulate cleanliness class. Microorganisms in the environment are monitored so that a microbial level for air, surface, and personnel gear are not exceeded for a specified cleanliness class.

(13) Component--Any ingredient intended for use in the compounding of a drug preparation, including those that may not appear in such preparation.

(14) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(B) for administration to a patient by a practitioner as the result of a practitioner's initiative based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(C) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(D) for or as an incident to research, teaching, or chemical analysis and not for sale or dispensing, except as allowed under §562.154 or Chapter 563 of the Occupations Code.

(15) Compounding Aseptic Isolator--A form of barrier isolator specifically designed for compounding pharmaceutical ingredients or preparations. It is designed to maintain an aseptic compounding environment within the isolator throughout the compounding and material transfer processes. Air exchange into the isolator from the surrounding environment shall not occur unless it has first passed through a microbial retentive filter (HEPA minimum).

(16) Compounding Aseptic Containment Isolator--A compounding aseptic isolator designed to provide worker protection from exposure to undesirable levels of airborne drug throughout the compounding and material transfer processes and to provide an aseptic environment for compounding sterile preparations. Air exchange with the surrounding environment should not occur unless the air is first passed through a microbial retentive filter (HEPA minimum) system capable of containing airborne concentrations of the physical size and state of the drug being compounded. Where volatile hazardous drugs are prepared, the exhaust air from the isolator should be appropriately removed by properly designed building ventilation.

(17) Critical Area--A critical area is an ISO Class 5 environment.

(18) Critical Sites--Sterile ingredients of compounded sterile preparations and locations on devices and components used to prepare, package, and transfer compounded sterile preparations that provide opportunity for exposure to contamination.

(19) Cytotoxic--A pharmaceutical that has the capability of killing living cells.

(20) Device--An instrument, apparatus, implement, machine, contrivance, implant, in-vitro reagent, or other similar or related article, including any component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner.

(21) Direct Compounding Area--A critical area within the ISO Class 5 primary engineering control where critical sites are exposed to unidirectional HEPA-filtered air, also known as first air.

(22) Disinfectant--A disinfectant is an agent that frees from infection, usually a chemical agent but sometimes a physical one, and that destroys disease-causing pathogens or other harmful microorganisms but may not kill bacterial spores. It refers to substances applied to inanimate objects.

(23) First Air--The air exiting the HEPA filter in a unidirectional air stream that is essentially particle free.

(24) Hot water--The temperature of water from the pharmacy's sink maintained at a minimum of 105 degrees F (41 degrees C).

(25) HVAC--Heating, ventilation, and air conditioning.

(26) Immediate use--A sterile preparation that is not prepared according to USP 797 standards (i.e. outside the pharmacy and most likely not by pharmacy personnel) which shall be stored for no longer than one hour after completion of the preparation.

(27) IPA--Isopropyl alcohol (2-propanol).

(28) Media-Fill Test--A media-fill test is used to qualify aseptic technique of compounding personnel or processes and to ensure that the processes used are able to produce sterile preparation without microbial contamination. During this test, a microbiological growth medium such as Soybean--Casein Digest Medium is substituted for the actual drug product to simulate admixture compounding. The issues to consider in the development of a media-fill test are the following: media-fill procedures, media selection, fill volume, incubation, time and temperature, inspection of filled units, documentation, interpretation of results, and possible corrective actions required.

(29) Multiple-Dose Container--A multiple-unit container for articles or preparations intended for potential administration only and usually contains antimicrobial preservatives. The beyond-use date for an opened or entered (e.g., needle-punctured) multiple-dose container with antimicrobial preservatives is 28 days, unless otherwise specified by the manufacturer.

(30) Negative Pressure Room--A room that is at a lower pressure compared to adjacent spaces and, therefore, the net flow of air is into the room.

(31) Office use--The administration of a compounded drug to a patient by a practitioner in the practitioner's office or by the practitioner in a health care facility or treatment setting, including a hospital, ambulatory surgical center, or pharmacy in accordance with Chapter 562 of the Act, or for administration or provision by a veterinarian in accordance with §563.054 of the Act.

(32) Pharmacy Bulk Package--A container of a sterile preparation for potential use that contains many single doses. The contents are intended for use in a pharmacy admixture program and are restricted to the preparation of admixtures for infusion or, through a sterile transfer device, for the filling of empty sterile syringes. The closure shall be penetrated only one time after constitution with a suitable sterile transfer device or dispensing set, which allows measured dispensing of the contents. The pharmacy bulk package is to be used only in a suitable work area such as a laminar flow hood (or an equivalent clean air compounding area).

(33) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original container into unit dose packaging or a multiple dose container for distribution within a facility licensed as a Class C pharmacy or to other pharmacies under common ownership for distribution within those facilities. The term as defined does not prohibit the prepackaging of drug products for use within other pharmacy classes.

(34) Preparation or Compounded Sterile Preparation--A sterile admixture compounded in a licensed pharmacy or other healthcare-related facility pursuant to the order of a licensed prescriber.

(35) Primary Engineering Control--A device or room that provides an ISO Class 5 environment for the exposure of critical sites when compounding sterile preparations. Such devices include, but may not be limited to, laminar airflow workbenches, biological safety cabinets, and compounding aseptic isolators and compounding aseptic containment isolators.

(36) Product--A product is a commercially manufactured sterile drug or nutrient that has been evaluated for safety and efficacy by the U.S. Food and Drug Administration (FDA). Products are accompanied by full prescribing information, which is commonly known as the FDA-approved manufacturer's labeling or product package insert.

(37) Positive Control--A quality assurance sample prepared to test positive for microbial growth.

(38) Positive Pressure Room--A room that is at a higher pressure compared to adjacent spaces and, therefore, the net airflow is out of the room.

(39) Quality assurance--The set of activities used to ensure that the process used in the preparation of sterile drug preparations lead to preparations that meet predetermined standards of quality.

(40) Quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final compounded sterile preparations prepared meet predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility.

(41) Reasonable quantity--An amount of a compounded drug that:

(A) does not exceed the amount a practitioner anticipates may be used in the practitioner's office or facility before the beyond use date of the drug;

(B) is reasonable considering the intended use of the compounded drug and the nature of the practitioner's practice; and

(C) for any practitioner and all practitioners as a whole, is not greater than an amount the pharmacy is capable of compounding in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation practices.

(42) Segregated Compounding Area--A designated space, either a demarcated area or room, that is restricted to preparing low-risk level compounded sterile preparations with 12-hour or less beyond-use date. Such area shall contain a device that provides unidirectional airflow of ISO Class 5 air quality for preparation of compounded sterile preparations and shall be void of activities and materials that are extraneous to sterile compounding.

(43) Single-dose container--A container intended for a single use, other than single-dose vials and single-dose large volume potential solutions. Examples of single-dose containers include pre-filled syringes, cartridges, and fusion-sealed containers without preservatives.

(44) Single-dose vial--A vial intended for a single use. Exceptions to this definition would be single dose vials routinely used to compound total potential nutrition (TPN) preparations (e.g., sodium chloride, sodium acetate, sodium phosphate, potassium chloride, potassium acetate, potassium phosphate, calcium glucontae, magnesium sulfate, multivitamin for injection, multi-trace elements, ascorbic acid, folic acid, heparin, phytonadione, l-carnitine, cysteine, selenium, injectable zinc).

(45) Single-dose large volume parenteral solution--Large volume parenteral solutions (i.e., containers of solution of at least 1000 mL) routinely used for compounding sterile TPN preparations or for batch compounding (e.g., sterile water for injection (SWFI); 5%, 10%, and 70% dextrose in SWFI; 0.9% sodium chloride; 0.45% sodium chloride; 5% dextrose/0.9% sodium chloride; 5% dextrose/0.45% sodium chloride).

(46) SOPs--Standard operating procedures.

(47) Terminal Sterilization--The application of a lethal process, e.g., steam under pressure or autoclaving, to sealed final preparation containers for the purpose of achieving a predetermined sterility assurance level of usually less than 106, i.e., or a probability of less than one in one million of a non-sterile unit.

(48) Unidirectional Flow--An airflow moving in a single direction in a robust and uniform manner and at sufficient speed to reproducibly sweep particles away from the critical processing or testing area.

(49) USP/NF--The current edition of the United States Pharmacopeia/National Formulary.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. The pharmacy shall have a pharmacist-in-charge in compliance with the specific license classification of the pharmacy.

(B) Responsibilities. In addition to the responsibilities for the specific class of pharmacy, the pharmacist-in-charge shall have the responsibility for, at a minimum, the following concerning the compounding of sterile preparations:

(i) developing a system to ensure that all pharmacy personnel responsible for compounding and/or supervising the compounding of sterile preparations within the pharmacy receive appropriate education and training and competency evaluation;

(ii) determining that all personnel involved in compounding sterile preparations obtain continuing education appropriate for the type of compounding done by the personnel;

(iii) supervising a system to ensure appropriate procurement of drugs and devices and storage of all pharmaceutical materials including pharmaceuticals, components used in the compounding of sterile preparations, and drug delivery devices;

(iv) ensuring that the equipment used in compounding is properly maintained;

(v) developing a system for the disposal and distribution of drugs from the pharmacy;

(vi) developing a system for bulk compounding or batch preparation of drugs;

(vii) developing a system for the compounding, sterility assurance, quality assurance, and quality control of sterile preparations; and

(viii) if applicable, ensuring that the pharmacy has a system to dispose of hazardous waste in a manner so as not to endanger the public health.

(2) Pharmacists. Special requirements for compounding sterile preparations.

(A) All pharmacists engaged in compounding sterile preparations shall:

(i) possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken or supervised; and

(ii) obtain continuing education appropriate for the type of compounding done by the pharmacist.

(B) A pharmacist shall inspect and approve all components, drug preparation containers, closures, labeling, and any other materials involved in the compounding process.

(C) A pharmacist shall review all compounding records for accuracy and conduct in-process and final checks to ensure that errors have not occurred in the compounding process.

(D) A pharmacist is responsible for the proper maintenance, cleanliness, and use of all equipment used in the compounding process.

(E) A pharmacist shall be accessible at all times to respond to patients' and other health professionals' questions and needs. Such access may be through a telephone or pager which is answered 24 hours a day.

(3) Pharmacy technicians and pharmacy technician trainees. Pharmacy technicians and pharmacy technician trainees may compound sterile preparations provided the pharmacy technicians and/or pharmacy technician trainees:

(A) have completed the education and training specified in paragraph (4) of this subsection; and

(B) are supervised by a pharmacist who has completed the training specified in paragraph (4) of this subsection, conducts in-process and final checks, and affixes his or her initials to the appropriate quality control records.

(4) Special education, training, and evaluation requirements for pharmacy personnel compounding or responsible for the direct supervision of pharmacy personnel compounding sterile preparations.

(A) General.

(i) All pharmacy personnel preparing sterile preparations shall receive didactic and experiential training and competency evaluation through demonstration, testing (written and practical) as outlined by the pharmacist-in-charge and described in the policy and procedure or training manual. Such training shall include instruction and experience in the following areas:

(I) aseptic technique;

(II) critical area contamination factors;

(III) environmental monitoring;

(IV) structure and engineering controls related to facilities;

(V) equipment and supplies;

(VI) sterile preparation calculations and terminology;

(VII) sterile preparation compounding documentation;

(VIII) quality assurance procedures;

(IX) aseptic preparation procedures including proper gowning and gloving technique;

(X) handling of cytotoxic and hazardous drugs, if applicable; and

(XI) general conduct in the controlled area.

(ii) The aseptic technique of each person compounding or responsible for the direct supervision of personnel compounding sterile preparations shall be observed and evaluated as satisfactory through written and practical tests, and media-fill challenge testing, and such evaluation documented.

(iii) Although media-fill tests may be incorporated into the experiential portion of a training program, media-fill tests must be conducted at each pharmacy where an individual compounds sterile preparations. No preparation intended for patient use shall be compounded by an individual until the on-site media-fill tests test indicates that the individual can competently perform aseptic procedures, except that a pharmacist may temporarily compound sterile preparations and supervise pharmacy technicians compounding sterile preparations without media-fill tests provided the pharmacist:

(I) has completed a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE accredited provider which provides 20 hours of instruction and experience in the areas listed in this subparagraph; and

(II) completes the on-site media-fill tests within seven days of commencing work at the pharmacy.

(iv) Media-fill tests procedures for assessing the preparation of specific types of sterile preparations shall be representative of all types of manipulations, products, risk levels, and batch sizes that personnel preparing that type of sterile preparation are likely to encounter.

(v) The pharmacist-in-charge shall ensure continuing competency of pharmacy personnel through in-service education, training, and media-fill tests to supplement initial training. Personnel competency shall be evaluated:

(I) during orientation and training prior to the regular performance of those tasks;

(II) whenever the quality assurance program yields an unacceptable result;

(III) whenever unacceptable techniques are observed; and

(IV) at least on an annual basis for low- and medium-risk level compounding, and every six months for high-risk level compounding.

(B) Pharmacists.

(i) All pharmacists who compound sterile preparations for administration to patients or supervise pharmacy technicians and pharmacy technician trainees compounding sterile preparations shall:

(I) complete through a single course, a minimum of 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be obtained through:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which pro-

vides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE accredited provider which provides 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph.

(II) possess knowledge about:

(-a-) aseptic processing;

(-b-) quality control and quality assurance as related to environmental, component, and finished preparation release checks and tests;

(-c-) chemical, pharmaceutical, and clinical properties of drugs;

(-d-) container, equipment, and closure system selection; and

(-e-) sterilization techniques.

(ii) The required experiential portion of the training programs specified in this subparagraph must be supervised by an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(C) Pharmacy technicians and pharmacy technician trainees. In addition to specific qualifications for registration, all pharmacy technicians and pharmacy technician trainees who compound sterile preparations for administration to patients shall:

(i) have initial training obtained either through completion of:

(I) a single course, a minimum of 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be obtained through:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a course sponsored by an ACPE accredited provider which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; or

(II) a training program which is accredited by the American Society of Health-System Pharmacists. Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile preparations in a licensed pharmacy provided:

(-a-) the compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(-b-) the individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in subparagraph (B) of this paragraph; and

(-c-) the supervising pharmacist conducts in-process and final checks.

(ii) acquire the required experiential portion of the training programs specified in this subparagraph under the supervision of an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(D) Documentation of Training. The pharmacy shall maintain a record on each person who compounds sterile preparations. The record shall contain, at a minimum, a written record of initial and in-service training, education, and the results of written and practical testing and media-fill testing of pharmacy personnel. The record shall be maintained and contain the following information:

(i) name of the person receiving the training or completing the testing or media-fill tests;

(ii) date(s) of the training, testing, or media-fill challenge testing;

(iii) general description of the topics covered in the training or testing or of the process validated;

(iv) name of the person supervising the training, testing, or media-fill challenge testing; and

(v) signature or initials of the person receiving the training or completing the testing or media-fill challenge testing and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or media-fill challenge testing of personnel.

(d) Operational Standards.

(1) General Requirements.

(A) Sterile preparations may be compounded in licensed pharmacies:

(i) upon presentation of a practitioner's prescription drug or medication order based on a valid pharmacist/patient/prescriber relationship;

(ii) in anticipation of future prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(iii) in reasonable quantities for office use by a practitioner and for use by a veterinarian.

(B) Sterile compounding in anticipation of future prescription drug or medication orders must be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time.

(i) The pharmacist's professional judgment shall be based on the criteria used to determine a beyond-use date outlined in paragraph (5)(G) of this subsection.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time must be maintained and be available for inspection.

(iii) Any preparation compounded in anticipation of future prescription drug or medication orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded preparation or list of the active ingredients and strengths;

(II) facility's lot number;

(III) beyond-use date as determined by the pharmacist using appropriate documented criteria as outlined in paragraph (5)(G) of this subsection;

(IV) quantity or amount in the container;

(V) appropriate ancillary instructions, such as storage instructions or cautionary statements, including hazardous drug warning labels where appropriate; and

(VI) device-specific instructions, where appropriate.

(C) Commercially available products may be compounded for dispensing to individual patients provided the following conditions are met:

(i) the commercial product is not reasonably available from normal distribution channels in a timely manner to meet patient's needs;

(ii) the pharmacy maintains documentation that the product is not reasonably available due to a drug shortage or unavailability from the manufacturer; and

(iii) the prescribing practitioner has requested that the drug be compounded as described in subparagraph (D) of this paragraph.

(D) A pharmacy may not compound preparations that are essentially copies of commercially available products (e.g., the preparation is dispensed in a strength that is only slightly different from a commercially available product) unless the prescribing practitioner specifically orders the strength or dosage form and specifies why the patient needs the particular strength or dosage form of the preparation. The prescribing practitioner shall provide documentation of a patient specific medical need and the preparation produces a clinically significant therapeutic response (e.g. the physician requests an alternate product due to hypersensitivity to excipients or preservative in the FDA-approved product, or the physician requests an effective alternate dosage form) or if the drug product is not commercially available. The unavailability of such drug product must be documented prior to compounding. The methodology for documenting unavailability includes maintaining a copy of the wholesaler's notification showing back-ordered, discontinued, or out-of-stock items. This documentation must be available in hard-copy or electronic format for inspection by the board.

(E) A pharmacy may enter into an agreement to compound and dispense prescription/medication orders for another pharmacy provided the pharmacy complies with the provisions of §291.125 of this title (relating to Centralized Prescription Dispensing).

(F) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide sterile prescription compounding services, which may include specific drug preparations and classes of drugs.

(G) A pharmacy may not compound veterinary preparations for use in food producing animals except in accordance with federal guidelines.

(2) Microbial Contamination Risk Levels. Risk Levels for sterile compounded preparations shall be as outlined in Chapter 797, Pharmacy Compounding--Sterile Preparations of the USP/NF and as listed below.

(A) Low-risk level compounded sterile preparations.

(i) Low-Risk conditions. Low-risk level compounded sterile preparations are those compounded under all of the following conditions.

(I) The compounded sterile preparations are compounded with aseptic manipulations entirely within ISO Class 5 or better air quality using only sterile ingredients, products, components, and devices.

(II) The compounding involves only transfer, measuring, and mixing manipulations with closed or sealed packaging systems that are preformed promptly and attentively.

(III) Manipulations are limited to aseptically opening ampuls, penetrating sterile stoppers on vials with sterile needles and syringes, and transferring sterile liquids in sterile syringes to sterile administration devices and packages of other sterile products.

(IV) For a low-risk preparation, in the absence of direct sterility testing results or appropriate information sources that justify different limits, the storage periods may not exceed the following periods: before administration, 48 hours at controlled room temperature, for not more than 14 days if stored at a cold temperature, and for 45 days if stored in a frozen state at minus 20 degrees Celsius or colder). For delayed activation device systems, the storage period begins when the device is activated.

(ii) Examples of Low-Risk Compounding. Examples of low-risk compounding include the following.

(I) Single volume transfers of sterile dosage forms from ampuls, bottles, bags, and vials using sterile syringes with sterile needles, other administration devices, and other sterile containers. The solution content of ampules shall be passed through a sterile filter to remove any glass particles.

(II) Manually measuring and mixing no more than three manufactured products to compound drug admixtures.

(B) Low-Risk Level compounded sterile preparations with 12-hour or less beyond-use date. Low-risk level compounded sterile preparations are those compounded pursuant to a physician's order for a specific patient under all of the following conditions.

(i) The compounded sterile preparations are compounded in compounding aseptic isolator or compounding aseptic containment isolator that does not meet the requirements described in paragraph (5)(A)(ii)(II) of this subsection relating to Low and Medium Risk Preparations or the compounded sterile preparations are compounded in laminar airflow workbench or a biological safety cabinet that cannot be located within an ISO Class 7 buffer area.

(ii) The primary engineering control device is located in a segregated compounding area restricted to sterile compounding activities that minimizes the risk of contamination of the compounded sterile preparation.

(iii) The segregated compounding area shall not be in a location that has unsealed windows or doors that connect to the outdoors, or that is adjacent to construction sites, warehouses, or food preparation.

(iv) For a low-risk preparation compounded as described in clauses (i) - (iii) of this subparagraph, administration of such compounded sterile preparations must commence within 12 hours of preparation or as recommended in the manufacturers' package insert, whichever is less.

(C) Medium-risk level compounded sterile preparations.

(i) Medium-Risk Conditions. Medium-risk level compounded sterile preparations, are those compounded aseptically under low-risk conditions and one or more of the following conditions exists.

(I) Multiple individual or small doses of sterile products are combined or pooled to prepare a compounded sterile preparation that will be administered either to multiple patients or to one patient on multiple occasions.

(II) The compounding process includes complex aseptic manipulations other than the single-volume transfer.

(III) The compounding process requires unusually long duration, such as that required to complete the dissolution or homogenous mixing (e.g., reconstitution of intravenous immunoglobulin or other intravenous protein products).

(IV) The compounded sterile preparations do not contain broad spectrum bacteriostatic substances and they are administered over several days (e.g., an externally worn infusion device).

(V) For a medium-risk preparation, in the absence of direct sterility testing results or appropriate information sources that justify different limits the beyond use dates may not exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 30 hours at controlled room temperature, for not more than 9 days at a cold temperature, and for 45 days in solid frozen state at minus 20 degrees Celsius or colder.

(ii) Examples of medium-risk compounding. Examples of medium-risk compounding include the following.

(I) Compounding of total parenteral nutrition fluids using a manual or automated device during which there are multiple injections, detachments, and attachments of nutrient source products to the device or machine to deliver all nutritional components to a final sterile container.

(II) Filling of reservoirs of injection and infusion devices with multiple sterile drug products and evacuations of air from those reservoirs before the filled device is dispensed.

(III) Filling of reservoirs of injection and infusion devices with volumes of sterile drug solutions that will be administered over several days at ambient temperatures between 25 and 40 degrees Celsius (77 and 104 degrees Fahrenheit).

(IV) Transfer of volumes from multiple ampuls or vials into a single, final sterile container or product.

(D) High-risk level compounded sterile preparations.

(i) High-risk Conditions. High-risk level compounded sterile preparations are those compounded under any of the following conditions.

(I) Non-sterile ingredients, including manufactured products are incorporated or a non-sterile device is employed before terminal sterilization.

(II) Sterile ingredients, components, devices, and mixtures are exposed to air quality inferior to ISO Class 5. This includes storage in environments inferior to ISO Class 5 of opened or partially used packages of manufactured sterile products that lack antimicrobial preservatives.

(III) Non-sterile preparations are exposed no more than 6 hours before being sterilized.

(IV) It is assumed, and not verified by examination of labeling and documentation from suppliers or by direct determination, that the chemical purity and content strength of ingredients meet their original or compendial specifications in unopened or in opened packages of bulk ingredients.

(V) For a high-risk preparation, in the absence of direct sterility testing results or appropriate information sources that justify different limits, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 24 hours at controlled room temperature, for not more than 3 days at a cold temperature, and for 45 days in solid frozen state at minus 20 degrees or colder.

(VI) All non-sterile measuring, mixing, and purifying equipment is rinsed thoroughly with sterile, pyrogen-free water, and then thoroughly drained or dried immediately before use for high-risk compounding while assuring cleanliness. All high-risk compounded sterile aqueous solutions subjected to terminal sterilization are passed through a filter with a nominal porosity not larger than 1.2 micron preceding or during filling into their final containers to remove particulate matter. Sterilization of high-risk level compounded sterile preparations by filtration shall be performed entirely within an ISO Class 5 or superior air quality environment.

(ii) Examples of high-risk compounding. Examples of high-risk compounding include the following.

(I) Dissolving non-sterile bulk drug powders to make solutions, which will be terminally sterilized.

(II) Exposing the sterile ingredients and components used to prepare and package compounded sterile preparations to room air quality worse than ISO Class 5.

(III) Measuring and mixing sterile ingredients in non-sterile devices before sterilization is performed.

(IV) Assuming, without appropriate evidence or direct determination, that packages of bulk ingredients contain at least 95% by weight of their active chemical moiety and have not been contaminated or adulterated between uses.

(3) Immediate Use Compounded Sterile Preparations. For the purpose of emergency or immediate patient care, such situations may include cardiopulmonary resuscitation, emergency room treatment, preparation of diagnostic agents, or critical therapy where the preparation of the compounded sterile preparation under low-risk level conditions would subject the patient to additional risk due to delays in therapy. Compounded sterile preparations are exempted from the requirements described in this paragraph for low-risk, medium-risk, and high-risk level compounded sterile preparations when all of the following criteria are met.

(A) Only simple aseptic measuring and transfer manipulations are performed with not more than three sterile non-hazardous commercial drug and diagnostic radiopharmaceutical drug products, including an infusion or diluent solution.

(B) Unless required for the preparation, the preparation procedure occurs continuously without delays or interruptions and does not exceed 1 hour.

(C) Administration begins not later than one hour following the completion of preparing the compounded sterile preparation.

(D) When the compounded sterile preparations is not administered by the person who prepared it, or its administration is not witnessed by the person who prepared it, the compounded sterile preparation shall bear a label listing patient identification information such as name and identification number(s), the names and amounts of all ingredients, the name or initials of the person who prepared the compounded sterile preparation, and the exact 1-hour beyond-use time and date.

(E) If administration has not begun within one hour following the completion of preparing the compounded sterile preparation, the compounded sterile preparation is promptly and safely discarded. Immediate use compounded sterile preparations shall not be stored for later use.

(F) Cytotoxic drugs shall not be prepared as immediate use compounded sterile preparations.

(4) Library. In addition to the library requirements of the pharmacy's specific license classification, a pharmacy shall maintain current or updated copies in hard-copy or electronic format of each of the following:

(A) a reference text on injectable drug preparations, such as Handbook on Injectable Drug Products;

(B) a specialty reference text appropriate for the scope of pharmacy services provided by the pharmacy, e.g., if the pharmacy prepares hazardous drugs, a reference text on the preparation of hazardous drugs; and

(C) the United States Pharmacopeia/National Formulary or the USP Pharmacist's Pharmacopeia containing USP Chapter 797, Pharmaceutical Compounding--Sterile Preparations.

(5) Environment. Compounding facilities shall be physically designed and environmentally controlled to minimize airborne contamination of critical sites.

(A) Low and Medium Risk Preparations.

(i) A pharmacy that prepares low- and medium-risk preparations shall have a clean room/controlled area for the compounding of sterile preparations that is constructed to minimize the opportunities for particulate and microbial contamination. The clean room/controlled area shall:

(I) be clean, well lit, and of sufficient size to support sterile compounding activities;

(II) be used only for the compounding of sterile preparations;

(III) be designed such that hand sanitizing and gowning occurs outside the buffer area but allows hands-free access by compounding personnel to the buffer room/area;

(IV) have non-porous and washable floors or floor covering to enable regular disinfection;

(V) be ventilated in a manner to avoid disruption from the HVAC system and room cross-drafts;

(VI) have walls, ceilings, floors, fixtures, shelving, counters, and cabinets that are smooth, impervious, free from cracks and crevices (e.g., coved), nonshedding and resistant to damage by disinfectant agents;

(VII) have junctures of ceilings to walls coved or caulked to avoid cracks and crevices;

(VIII) have drugs and supplies stored on shelving areas above the floor to permit adequate floor cleaning;

(IX) contain only the appropriate compounding supplies and not be used for bulk storage for supplies and materials. Objects that shed particles shall not be brought into the controlled area;

(X) contain an anteroom/ante-zone that provides at least an ISO class 8 air quality and may contain a sink that enables hands-free use with a closed system of soap dispensing to minimize the risk of extrinsic contamination; and

(XI) contain a buffer zone or buffer room designed to maintain at least ISO Class 7 conditions. The following is applicable for the buffer area.

(-a-) There shall be some demarcation designation that delineates the anteroom or area from the buffer area. The demarcation shall be such that it does not create conditions that could adversely affect the cleanliness of the area.

(-b-) The buffer area shall be segregated from surrounding, unclassified spaces to reduce the risk of contaminants being blown, dragged, or otherwise introduced into the filtered unidirectional airflow environment, and this segregation should be continuously monitored.

(-c-) A buffer zone that is not physically separated from the anteroom shall employ the principle of displacement airflow as defined in Chapter 797, Pharmaceutical Compounding--Sterile Preparations, of the USP/NF, with limited access to personnel.

(-d-) The buffer area shall not contain sources of water (i.e., sinks) or floor drains.

(ii) The pharmacy shall prepare sterile pharmaceuticals in a primary engineering control device, such as a laminar air flow hood, biological safety cabinet, compounding aseptic isolator, compounding aseptic containment isolator which is capable of maintaining at least ISO Class 5 conditions during normal activity.

(I) The primary engineering control shall:

(-a-) be located in the buffer area or room and placed in the buffer area in a manner as to avoid conditions that could adversely affect its operation such as strong air currents from opened doors, personnel traffic, or air streams from the heating, ventilating and air condition system.

(-b-) be certified by an independent contractor according to the International Organization of Standardization (ISO) Classification of Particulate Matter in Room Air (ISO 14644-1) for operational efficiency at least every six months and when it is relocated, in accordance with the manufacturer's specifications; and

(-c-) have pre-filters inspected periodically and replaced as needed, in accordance with written policies and procedures and the manufacturer's specification, and the inspection and/or replacement date documented.

(II) The compounding aseptic isolator or compounding aseptic containment isolator must be placed in an ISO Class 7 buffer area unless the isolator meets all of the following conditions.

(-a-) The isolator must provide isolation from the room and maintain ISO Class 5 during dynamic operating conditions including transferring ingredients, components, and devices into and out of the isolator and during preparation of compounded sterile preparations.

(-b-) Particle counts sampled approximately 6 to 12 inches upstream of the critical exposure site must maintain ISO Class 5 levels during compounding operations.

(-c-) The pharmacy shall maintain documentation from the manufacturer that the isolator meets this standard when located in worse than ISO Class 7 environments.

(B) High-risk Preparations. In addition to the requirements in subparagraph (A) of this paragraph, when high-risk preparations are compounded, the primary engineering control shall be located in a buffer room that provides a physical separation, through the use of walls, doors and pass-throughs and has a minimum differential positive pressure of 0.02 to 0.05 inches water column.

(C) Automated compounding device. If automated compounding devices are used, the pharmacy shall have a method to calibrate and verify the accuracy of automated compounding devices used in aseptic processing and document the calibration and verification on a routine basis, based on the manufacturer's recommendations.

(D) Cytotoxic drugs. If the preparation is cytotoxic, the following is also applicable.

(i) General.

(I) All personnel involved in the compounding of cytotoxic products shall wear appropriate protective apparel, such as gowns, face masks, eye protection, hair covers, shoe covers or dedicated shoes, and appropriate gloving.

(II) Appropriate safety and containment techniques for compounding cytotoxic drugs shall be used in conjunction with aseptic techniques required for preparing sterile preparations.

(III) Disposal of cytotoxic waste shall comply with all applicable local, state, and federal requirements.

(IV) Prepared doses of cytotoxic drugs must be dispensed, labeled with proper precautions inside and outside, and distributed in a manner to minimize patient contact with cytotoxic agents.

(ii) Primary engineering control device. Cytotoxic drugs shall be prepared in a Class II or III vertical flow biological safety cabinet or compounding aseptic containment isolator located in an ISO Class 7 area that is physically separated from other preparation areas. The area for preparation of sterile chemotherapeutic preparations shall:

(I) have not less than 0.01 inches water column negative pressure to the adjacent positive pressure ISO Class 7 or better antearea; and

(II) have a pressure indicator that can be readily monitored for correct room pressurization.

(E) Cleaning and disinfecting the sterile compounding areas. The following cleaning and disinfecting practices and frequencies apply to direct and contiguous compounding areas, which include ISO Class 5 compounding areas for exposure of critical sites as well as buffer rooms, anterooms, and ante-areas.

(i) The pharmacist-in-charge is responsible for developing written procedures for cleaning and disinfecting the direct and contiguous compounding areas and assuring the procedures are followed.

(ii) These procedures shall be conducted prior to and after each work shift (at a minimum of every 12 hours while the pharmacy is open) and when there are spills or environmental quality breaches.

(iii) Before compounding is performed, all items are removed from the direct and contiguous compounding areas and all surfaces are cleaned of loose material and residue from spills, followed by an application of a residue-free disinfecting agent (e.g., IPA), that is left on for a time sufficient to exert its antimicrobial effect.

(iv) Work surfaces near the direct and contiguous compounding areas in the buffer or clean area are cleaned of loose material and residue from spills, followed by an application of a residue-free disinfecting agent that is left on for a time sufficient to exert its antimicrobial effect.

(v) Floors in the buffer or clean area are cleaned by mopping at least once daily when no aseptic operations are in progress preceding from the buffer or clean room area to the anteroom area.

(vi) In the anteroom area, walls, ceilings, and shelving shall be cleaned monthly.

(vii) Supplies and equipment removed from shipping cartons must be wiped with a disinfecting agent, such as IPA. However, if supplies are received in sealed pouches, the pouches may be removed as the supplies are introduced into the buffer or clean area without the need to disinfect the individual supply items. No shipping or other external cartons may be taken into the buffer or clean area.

(viii) Storage shelving, emptied of all supplies, walls, and ceilings are cleaned and disinfected at planned intervals, monthly, if not more frequently.

(F) Security requirements. The pharmacy may authorize personnel to gain access to that area of the pharmacy containing dispensed sterile preparations, in the absence of the pharmacist, for the purpose of retrieving dispensed prescriptions to deliver to patients. If the pharmacy allows such after-hours access, the area containing the dispensed sterile pharmaceuticals shall be an enclosed and lockable area separate from the area containing undispensed prescription drugs. A list of the authorized personnel having such access shall be in the pharmacy's policy and procedure manual.

(G) Storage requirements and beyond-use dating.

(i) Storage requirements. All drugs shall be stored at the proper temperature and conditions, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(ii) Beyond-use dating.

(I) Beyond-use dates for compounded sterile preparations shall be assigned based on professional experience, which shall include careful interpretation of appropriate information sources for the same or similar formulations.

(II) Beyond-use dates for compounded sterile preparations that are prepared strictly in accordance with manufacturers' product labeling must be those specified in that labeling, or from appropriate literature sources or direct testing.

(III) Beyond-use dates for compounded sterile preparations that lack justification from either appropriate literature sources or by direct testing evidence must be assigned as described in Chapter 797, Pharmaceutical Compounding--Sterile Preparations of the USP/NF.

(6) Equipment and supplies. Pharmacies compounding sterile preparations shall have the following equipment and supplies:

(A) a calibrated system or device (i.e., thermometer) to monitor the temperature to ensure that proper storage requirements are met, if sterile pharmaceuticals are stored in the refrigerator;

(B) a calibrated system or device to monitor the temperature where bulk chemicals are stored;

(C) if applicable, a Class A prescription balance, or analytical balance and weights. Such balance shall be properly maintained and subject to periodic inspection by the Texas State Board of Pharmacy;

(D) equipment and utensils necessary for the proper compounding of sterile preparations. Such equipment and utensils used in the compounding process shall be:

(i) of appropriate design, appropriate capacity, and be operated within designed operational limits;

(ii) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug preparation beyond the desired result;

(iii) cleaned and sanitized immediately prior to and after each use; and

(iv) routinely inspected, calibrated (if necessary), or checked to ensure proper performance;

(E) appropriate disposal containers for used needles, syringes, etc., and if applicable, hazardous waste from the preparation of hazardous drugs and/or biohazardous waste;

(F) appropriate packaging or delivery containers to maintain proper storage conditions for sterile preparations;

(G) infusion devices, if applicable; and

(H) all necessary supplies, including:

(i) disposable needles, syringes, and other supplies for aseptic mixing;

(ii) disinfectant cleaning solutions;

(iii) hand washing agents with bactericidal action;

(iv) disposable, lint free towels or wipes;

(v) appropriate filters and filtration equipment;

(vi) cytotoxic spill kits, if applicable; and

(vii) masks, caps, coveralls or gowns with tight cuffs, shoe covers, and gloves, as applicable.

(7) Labeling.

(A) Prescription drug or medication orders. In addition to the labeling requirements for the pharmacy's specific license classification, the label dispensed or distributed pursuant to a prescription drug or medication order shall contain the following.

(i) The generic name(s) or the official name(s) of the principal active ingredient(s) of the compounded sterile preparation.

(ii) For outpatient prescription orders only, a statement that the compounded sterile preparation has been compounded by the pharmacy. (An auxiliary label may be used on the container to meet this requirement).

(iii) A beyond-use date. The beyond-use date shall be determined as outlined in Chapter 797, Pharmacy Compounding--Sterile Preparations of the USP/NF, and paragraph (4) of this subsection.

(B) Batch. If the sterile pharmaceutical is compounded in a batch, the following shall also be included on the batch label.

(i) unique lot number assigned to the batch;

(ii) quantity;

(iii) appropriate ancillary instructions, such as storage instructions or cautionary statements, including hazardous drug warning labels where appropriate; and

(iv) device-specific instructions, where appropriate.

(C) Pharmacy bulk package. The label of a pharmacy bulk package shall:

(i) state prominently "Pharmacy Bulk Package--Not for Direct Infusion;"

(ii) contain or refer to information on proper techniques to help ensure safe use of the preparation; and

(iii) bear a statement limiting the time frame in which the container may be used once it has been entered, provided it is held under the labeled storage conditions.

(8) Written drug information for prescription drug orders only. Written information about the compounded preparation or its major active ingredient(s) shall be given to the patient at the time of dispensing a prescription drug order. A statement which indicates that the preparation was compounded by the pharmacy must be included in this written information. If there is no written information available, the patient shall be advised that the drug has been compounded and how to contact a pharmacist, and if appropriate, the prescriber, concerning the drug.

(9) Pharmaceutical Care Services. In addition to the pharmaceutical care requirements for the pharmacy's specific license classification, the following requirements for sterile preparations compounded pursuant to prescription drug orders must be met.

(A) Primary provider. There shall be a designated physician primarily responsible for the patient's medical care. There shall be a clear understanding between the physician, the patient, and the pharmacy of the responsibilities of each in the areas of the delivery of care, and the monitoring of the patient. This shall be documented in the patient medication record (PMR).

(B) Patient training. The pharmacist-in-charge shall develop policies to ensure that the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use, including instruction when applicable, regarding:

(i) appropriate disposition of hazardous solutions and ancillary supplies;

(ii) proper disposition of controlled substances in the home;

(iii) self-administration of drugs, where appropriate;

(iv) emergency procedures, including how to contact an appropriate individual in the event of problems or emergencies related to drug therapy; and

(v) if the patient or patient's caregiver prepares sterile preparations in the home, the following additional information shall be provided:

(I) safeguards against microbial contamination, including aseptic techniques for compounding intravenous admixtures and aseptic techniques for injecting additives to premixed intravenous solutions;

(II) appropriate storage methods, including storage durations for sterile pharmaceuticals and expirations of self-mixed solutions;

(III) handling and disposition of premixed and self-mixed intravenous admixtures; and

(IV) proper disposition of intravenous admixture compounding supplies such as syringes, vials, ampules, and intravenous solution containers.

(C) Pharmacist-patient relationship. It is imperative that a pharmacist-patient relationship be established and maintained throughout the patient's course of therapy. This shall be documented in the patient's medication record (PMR).

(D) Patient monitoring. The pharmacist-in-charge shall develop policies to ensure that:

(i) the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider; and

(ii) the first dose of any new drug therapy is administered in the presence of an individual qualified to monitor for and respond to adverse drug reactions.

(10) Drugs, components, and materials used in sterile compounding.

(A) Drugs used in sterile compounding shall be a USP/NF grade substances manufactured in an FDA-registered facility.

(B) If USP/NF grade substances are not available shall be of a chemical grade in one of the following categories:

(i) Chemically Pure (CP);

(ii) Analytical Reagent (AR);

(iii) American Chemical Society (ACS); or

(iv) Food Chemical Codex.

(C) If a drug, component or material is not purchased from a FDA-registered facility, the pharmacist shall establish purity and stability by obtaining a Certificate of Analysis from the supplier and the pharmacist shall compare the monograph of drugs in a similar class to the Certificate of Analysis.

(D) All components shall:

(i) be manufactured in an FDA-registered facility; or

(ii) in the professional judgment of the pharmacist, be of high quality and obtained from acceptable and reliable alternative sources; and

(iii) stored in properly labeled containers in a clean, dry area, under proper temperatures.

(E) Drug product containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug preparation beyond the desired result.

(F) Components, drug preparation containers, and closures shall be rotated so that the oldest stock is used first.

(G) Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug preparation.

(H) A pharmacy may not compound a preparation that contains ingredients appearing on a federal Food and Drug Administration list of drug products withdrawn or removed from the market for safety reasons.

(11) Compounding process.

(A) Standard operating procedures (SOPs). All significant procedures performed in the compounding area shall be covered by written SOPs designed to ensure accountability, accuracy, quality, safety, and uniformity in the compounding process. At a minimum, SOPs shall be developed for:

(i) the facility;

(ii) equipment;

(iii) personnel;

(iv) preparation evaluation;

(v) quality assurance;

(vi) preparation recall;

(vii) packaging; and

(viii) storage of compounded sterile preparations.

(B) USP/NF. Any compounded formulation with an official monograph in the USP/NF shall be compounded, labeled, and packaged in conformity with the USP/NF monograph for the drug.

(C) Personnel Cleansing and Garbing.

(i) Any person with an apparent illness or open lesion that may adversely affect the safety or quality of a drug preparation being compounded shall be excluded from direct contact with components, drug preparation containers, closures, any materials involved in the compounding process, and drug products until the condition is corrected.

(ii) Before entering the clean area, compounding personnel must remove the following:

(I) personal outer garments (e.g., bandanas, coats, hats, jackets, scarves, sweaters, vests);

(II) all cosmetics, because they shed flakes and particles; and

(III) all hand, wrist, and other body jewelry.

(iii) The wearing of artificial nails or extenders is prohibited while working in the sterile compounding environment.

(iv) Personnel must don personal protective equipment and perform hand hygiene in an order that proceeds from the dirtiest to the cleanest activities as follows:

(I) Activities considered the dirtiest include donning of dedicated shoes or shoe covers, head and facial hair covers (e.g., beard covers in addition to face masks), and face mask/eye shield. Eye shields are optional unless working with irritants like germicidal disinfecting agents.

(II) After donning dedicated shoes or shoe covers, head and facial hair covers, and face masks, personnel shall perform a hand hygiene procedure by removing debris from underneath fingernails using a nail cleaner under running warm water followed by vigorous hand washing. Personnel shall begin washing arms at the hands and continue washing to elbows for at least 30 seconds with either a plain (non-antimicrobial) soap, or antimicrobial soap, and water while in the anteroom/ante-area.

(III) After completion of hand washing, personnel shall don clean non-shedding gowns with sleeves that fit snugly around the wrists.

(IV) Gloves that form a continuous barrier with the gown shall be the last item donned before compounding begins.

(V) Gloves, either those which are sterile or have been disinfected by applying 70% IPA or appropriate disinfectant to all contact surface areas and allowed to dry, that form a continuous barrier with the gown shall be the last item donned before compounding begins. Routine application of 70% IPA shall occur throughout the compounding day and whenever nonsterile surfaces are touched.

(VI) When compounding personnel must temporarily exit the ISO Class 7 environment during a work shift, the exterior gown, if not visibly soiled, may be removed and retained in the ISO Class 8 anteroom/ante-area, to be re-donned during that same work shift only. However, shoe covers, hair and facial hair covers, face mask/eye shield, and gloves must be replaced with new ones before re-entering the ISO Class 7 clean environment along with performing proper hand hygiene.

(D) At each step of the compounding process, the pharmacist shall ensure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(12) Quality Assurance.

(A) Initial Formula Validation. Prior to routine compounding of a sterile preparation, a pharmacy shall conduct an evaluation that shows that the pharmacy is capable of compounding a product that is sterile and that contains the stated amount of active ingredient(s).

(i) Low risk preparations.

(I) Quality assurance practices include, but are not limited to the following:

(-a-) Routine disinfection and air quality testing of the direct compounding environment to minimize microbial surface contamination and maintain ISO Class 5 air quality.

(-b-) Visual confirmation that compounding personnel are properly donning and wearing appropriate items and types of protective garments and goggles.

(-c-) Review of all orders and packages of ingredients to ensure that the correct identity and amounts of ingredients were compounded.

(-d-) Visual inspection of compounded sterile preparations to ensure the absence of particulate matter in solutions, the absence of leakage from vials and bags, and the accuracy and thoroughness of labeling.

(II) Example of a Media-Fill Test Procedure. This, or an equivalent test, is performed at least annually by each person authorized to compound in a low-risk level under conditions that closely simulate the most challenging or stressful conditions encountered during compounding of low-risk level sterile produce. Once begun, this test is completed without interruption within an ISO Class 5 air quality environment. Three sets of four 5-milliliter aliquots of sterile Soybean--Casein Digest Medium are transferred with the same sterile 10-milliliter syringe and vented needle combination into separate sealed, empty, sterile 30-milliliter clear vials (i.e., four 5-milliliter aliquots into each of three 30-milliliter vials). Sterile adhesive seals are aseptically affixed to the rubber closures on the three filled vials. The vials are incubated within a range of 20 - 35 degrees Celsius for 14 days. Failure is indicated by visible turbidity in the medium on or before 14 days. The media-fill test must include a positive-control sample.

(ii) Medium risk preparations.

(I) Quality assurance procedures for medium-risk level compounded sterile preparations include all those for low-risk level compounded sterile preparations, as well as a more challenging media-fill test passed annually, or more frequently.

(II) Example of a Media-Fill Test Procedure. This, or an equivalent test, is performed at least annually under conditions that closely simulate the most challenging or stressful conditions encountered during compounding. This test is completed without interruption within an ISO Class 5 air quality environment. Six 100-milliliter aliquots of sterile Soybean--Casein Digest Medium are aseptically transferred by gravity through separate tubing sets into separate evacuated sterile containers. The six containers are then arranged as three pairs, and a sterile 10-milliliter syringe and 18-gauge needle combination is used to exchange two 5-milliliter aliquots of medium from one container to the other container in the pair. For example, after a 5-milliliter aliquot from the first container is added to the second container in the pair, the second container is agitated for 10 seconds, then a 5-milliliter aliquot is removed and returned to the first container in the pair. The first container is then agitated for 10 seconds, and the next 5-milliliter aliquot is transferred from it back to the second container in the pair. Following the two 5-milliliter aliquot exchanges in each pair of containers, a 5-milliliter aliquot of medium from each container is aseptically injected into a sealed, empty, sterile 10-milliliter clear vial, using a sterile 10-milliliter syringe and vented needle. Sterile adhesive seals are aseptically affixed to the rubber closures on the three filled vials. The vials are incubated within a range of 20 - 35 degrees Celsius for 14 days. Failure is indicated by visible turbidity in the medium on or before 14 days. The media-fill test must include a positive-control sample.

(iii) High risk preparations.

(I) Procedures for high-risk level compounded sterile preparations include all those for low-risk level compounded sterile preparations. In addition, a media-fill test that represents high-risk level compounding is performed twice a year by each person authorized to compound high-risk level compounded sterile preparations.

(II) Example of a Media-Fill Test Procedure Compounded Sterile Preparations Sterilized by Filtration. This test, or an equivalent test, is performed under conditions that closely simulate the most challenging or stressful conditions encountered when compounding high-risk level compounded sterile preparations. Note: Sterility tests for autoclaved compounded sterile preparations are not required unless they are prepared in batches of more than 25 units. This test is completed without interruption in the following sequence:

(-a-) Dissolve 3 grams of nonsterile commercially available Soybean--Casein Digest Medium in 100 milliliters of non-bacteriostatic water to make a 3% nonsterile solution.

(-b-) Draw 25 milliliters of the medium into each of three 30-milliliter sterile syringes. Transfer 5 milliliters from each syringe into separate sterile 10-milliliter vials. These vials are the positive controls to generate exponential microbial growth, which is indicated by visible turbidity upon incubation.

(-c-) Under aseptic conditions and using aseptic techniques, affix a sterile 0.2-micron porosity filter unit and a 20-gauge needle to each syringe. Inject the next 10 milliliters from each syringe into three separate 10-milliliter sterile vials. Repeat the process for three more vials. Label all vials, affix sterile adhesive seals to the closure of the nine vials, and incubate them at 20 to 35 degrees Celsius. Inspect for microbial growth over 14 days as described in Chapter 797 Pharmaceutical Compounding--Sterile Preparations, of the USP/NF.

(B) Finished preparation release checks and tests.

(i) High-risk level compounded sterile preparations. All high-risk level compounded sterile preparations that are prepared in groups of more than 25 identical individual single-dose packages (such as ampuls, bags, syringes, and vials), or in multiple dose vials for administration to multiple patients, or are exposed longer than 12 hours at 2 - 8 degrees Celsius (36 - 46 degrees Fahrenheit) and longer than six hours at warmer than 8 degrees Celsius (46 degrees Fahrenheit) before they are sterilized shall be tested to ensure they are sterile and do not contain excessive bacterial endotoxins as specified in Chapter 71, Sterility Tests of the USP/NF.

(ii) All compounded sterile preparations that are intended to be solutions must be visually examined for the presence of particulate matter and not administered or dispensed when such matter is observed.

(iii) The prescription drug and medication orders, written compounding procedure, preparation records, and expended materials used to make compounded sterile preparations at all contamination risk levels shall be inspected for accuracy of correct identities and amounts of ingredients, aseptic mixing and sterilization, packaging, labeling, and expected physical appearance before they are administered or dispensed.

(13) Quality control.

(A) Quality control procedures. The pharmacy shall follow established quality control procedures to monitor the compounding environment and quality of compounded drug preparations for conformity with the quality indicators established for the preparation. When developing these procedures, pharmacy personnel shall consider the provisions of Chapter 797, Pharmaceutical Compounding--Sterile Preparations, Chapter 1075, Good Compounding Practices, and Chapter 1160, Pharmaceutical Calculations in Prescription Compounding of the current USP/NF. Such procedures shall be documented and be available for inspection.

(B) Verification of compounding accuracy and sterility.

(i) The accuracy of identities, concentrations, amounts, and purities of ingredients in compounded sterile preparations shall be confirmed by reviewing labels on packages, observing and documenting correct measurements with approved and correctly standardized devices, and reviewing information in labeling and certificates of analysis provided by suppliers.

(ii) If the correct identify, purity, strength, and sterility of ingredients and components of compounded sterile preparations cannot be confirmed such ingredients and components shall be discarded immediately.

(iii) If individual ingredients, such as bulk drug substances, are not labeled with expiration dates, when the drug substances are stable indefinitely in their commercial packages under labeled storage conditions, such ingredients may gain or lose moisture during storage and use and shall require testing to determine the correct amount to weigh for accurate content of active chemical moieties in compounded sterile preparations.

(e) Records.

(1) Maintenance of records. Every record required under this section must be:

(A) kept by the provider pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the provider pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) Compounding records.

(A) Compounding pursuant to patient specific prescription drug orders. Compounding records for all compounded pharmaceuticals shall be maintained by the pharmacy electronically or manually as part of the prescription drug or medication order, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) a complete formula, including methodology and necessary equipment which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) or official name and name(s) of the manufacturer(s) or distributor of the raw materials and the quantities of each;

(iii) signature or initials of the pharmacist or pharmacy technician or pharmacy technician trainee performing the compounding;

(iv) signature or initials of the pharmacist responsible for supervising pharmacy technicians or pharmacy technician trainees and conducting in-process and finals checks of compounded pharmaceuticals if pharmacy technicians or pharmacy technician trainees perform the compounding function;

(v) the quantity in units of finished products or amount of raw materials;

(vi) the container used and the number of units prepared; and

(vii) a reference to the location of the following documentation which may be maintained with other records, such as quality control records:

(I) the criteria used to determine the beyond-use date; and

(II) documentation of performance of quality control procedures.

(B) Compounding records when batch compounding or compounding in anticipation of future prescription drug or medication orders.

(i) Master work sheet. A master work sheet shall be developed and approved by a pharmacist for preparations prepared in batch. Once approved, a duplicate of the master work sheet shall be used as the preparation work sheet from which each batch is prepared and on which all documentation for that batch occurs. The master work sheet shall contain at a minimum:

(I) the formula;

(II) the components;

(III) the compounding directions;

(IV) a sample label;

(V) evaluation and testing requirements;

(VI) specific equipment used during preparation; and

(VII) storage requirements.

(ii) Preparation work sheet. The preparation work sheet for each batch of preparations shall document the following:

(I) identity of all solutions and ingredients and their corresponding amounts, concentrations, or volumes;

(II) lot number for each component;

(III) component manufacturer/distributor or suitable identifying number;

(IV) container specifications (e.g., syringe, pump cassette);

(V) unique lot or control number assigned to batch;

(VI) expiration date of batch-prepared preparations;

(VII) date of preparation;

(VIII) name, initials, or electronic signature of the person(s) involved in the preparation;

(IX) name, initials, or electronic signature of the responsible pharmacist;

(X) finished preparation evaluation and testing specifications, if applicable; and

(XI) comparison of actual yield to anticipated or theoretical yield, when appropriate.

(f) Office Use Compounding and Distribution of Compounded Preparations to Class C Pharmacies or Veterinarians in Accordance with §563.054 of the Act.

(1) General.

(A) A pharmacy may dispense and deliver a reasonable quantity of a compounded preparation to a practitioner for office use by the practitioner in accordance with this subsection.

(B) A Class A (Community) pharmacy is not required to register or be licensed under Chapter 431, Health and Safety Code, to distribute sterile compounded preparations to a Class C (Institutional) pharmacy.

(C) A Class C (Institutional) pharmacy is not required to register or be licensed under Chapter 431, Health and Safety Code, to distribute sterile compounded preparations that the Class C pharmacy has compounded for other Class C pharmacies under common ownership.

(D) To dispense and deliver a compounded preparation under this subsection, a pharmacy must:

(i) verify the source of the raw materials to be used in a compounded drug;

(ii) comply with applicable United States Pharmacopoeia guidelines, including the testing requirements, and the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191);

(iii) enter into a written agreement with a practitioner for the practitioner's office use of a compounded preparation;

(iv) comply with all applicable competency and accrediting standards as determined by the board; and

(v) comply with the provisions of this subsection.

(2) Written Agreement. A pharmacy that provides sterile compounded preparations to practitioners for office use or to another pharmacy shall enter into a written agreement with the practitioner or pharmacy. The written agreement shall:

(A) address acceptable standards of practice for a compounding pharmacy and a practitioner and receiving pharmacy that enter into the agreement including a statement that the compounded drugs may only be administered to the patient and may not be dispensed to the patient or sold to any other person or entity except as authorized by §563.054 of the Act;

(B) require the practitioner or receiving pharmacy to include on a patient's chart, medication order or medication administration record the lot number and beyond-use date of a compounded preparation administered to a patient;

(C) describe the scope of services to be performed by the pharmacy and practitioner or receiving pharmacy, including a statement of the process for:

(i) a patient to report an adverse reaction or submit a complaint; and

(ii) the pharmacy to recall batches of compounded preparations.

(3) Recordkeeping.

(A) Maintenance of Records.

(i) Records of orders and distribution of sterile compounded preparations to a practitioner for office use or to a Class C pharmacy for administration to a patient shall:

(I) be kept by the pharmacy and be available, for at least two years from the date of the record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies;

(II) maintained separately from the records of products dispensed pursuant to a prescription or medication order; and

(III) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy or its representative. If the pharmacy maintains the records in an electronic format, the requested records must be provided in an electronic format. Failure to provide the records set out in this subsection, either on site or within 72 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(ii) Records may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(B) Orders. The pharmacy shall maintain a record of all sterile compounded preparations ordered by a practitioner for office use or by a Class C pharmacy for administration to a patient. The record shall include the following information:

(i) date of the order;

(ii) name, address, and phone number of the practitioner who ordered the preparation and if applicable, the name, address and phone number of the Class C Pharmacy ordering the preparation; and

(iii) name, strength, and quantity of the preparation ordered.

(C) Distributions. The pharmacy shall maintain a record of all sterile compounded preparations distributed pursuant to an order to a practitioner for office use or by a Class C pharmacy for administration to a patient. The record shall include the following information:

(i) date the preparation was compounded;

(ii) date the preparation was distributed;

(iii) name, strength and quantity in each container of the preparation;

(iv) pharmacy's lot number;

(v) quantity of containers shipped; and

(vi) name, address, and phone number of the practitioner or Class C Pharmacy to whom the preparation is distributed.

(D) Audit Trail.

(i) The pharmacy shall store the order and distribution records of preparations for all sterile compounded preparations ordered by and or distributed to a practitioner for office use or by a Class C pharmacy for administration to a patient in such a manner as to be able to provide a audit trail for all orders and distributions of any of the following during a specified time period.

(I) any strength and dosage form of a preparation (by either brand or generic name or both);

(II) any ingredient;

(III) any lot number;

(IV) any practitioner;

(V) any facility; and

(VI) any pharmacy, if applicable.

(ii) The audit trail shall contain the following information:

(I) date of order and date of the distribution;

(II) practitioner's name, address, and name of the Class C pharmacy, if applicable;

(III) name, strength and quantity of the preparation in each container of the preparation;

(IV) name and quantity of each active ingredient;

(V) quantity of containers distributed; and

(VI) pharmacy's lot number;

(4) Labeling. The pharmacy shall affix a label to the preparation containing the following information:

(A) name, address, and phone number of the compounding pharmacy;

(B) the statement: "For Institutional or Office Use Only--Not for Resale"; or if the preparation is distributed to a veterinarian the statement: "Compounded Preparation";

(C) name and strength of the preparation or list of the active ingredients and strengths;

(D) pharmacy's lot number;

(E) beyond-use date as determined by the pharmacist using appropriate documented criteria;

(F) quantity or amount in the container;

(G) appropriate ancillary instructions, such as storage instructions or cautionary statements, including hazardous drug warning labels where appropriate; and

(H) device-specific instructions, where appropriate.

(g) Recall Procedures.

(1) The pharmacy shall have written procedure for the recall of any compounded sterile preparations provided to a patient, to a practitioner for office use, or to a pharmacy for administration. The recall procedures shall require:

(A) notification to each practitioner, facility, and/or pharmacy to which the preparation was distributed;

(B) notification to each patient to whom the preparation was dispensed;

(C) quarantine of the product if there is a suspicion of harm to a patient; and

(D) a recall if there is probable or confirmed harm to a patient.

(2) If the pharmacy identifies a suspicion of, probable, or confirmed harm to a patient, the pharmacy shall immediately notify and provide information as required by the board to the following:

(A) the Texas Department of State Health Services, Drugs and Medical Devices Group, if the preparation is distributed for office use; and

(B) the board.

(3) The board may require a pharmacy to institute a recall if there is probable or confirmed harm to a patient.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905292
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 6, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-8028

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CHAPTER 295. PHARMACISTS

22 TAC §295.13, §295.15

The Texas State Board of Pharmacy adopts amendments to §295.13, concerning Drug Therapy Management by a Pharmacist under Written Protocol of a Physician, and §295.15, concerning Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician. The amendments are adopted with changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6807).

The amendments to §295.13 implement the provisions of Senate Bill 381 as passed by the 81st Texas Legislature which amends Chapter 157 of the Medical Practices Act to allow a physician to delegate to a pharmacist the authority to implement or modify a patient's drug therapy under a protocol, including the authority to sign a prescription drug order for dangerous drugs. The amendments to §295.15 implement the provisions of House Bill (H.B.) 1409, passed during the 81st Regular Session of the Texas Legislature, authorizing pharmacists to administer influenza immunizations under the written protocol of a physician to patients over 7 years of age without an established patient-physician relationship.

The amendments to §295.15 are adopted with changes to the proposed text as noted below.

Comments were received from Senator Robert Nichols and the Texas Federation of Chain Drug Stores. Senator Nichols stated that the legislative intent of H.B. 1409 was to allow pharmacists to administer influenza vaccinations to children 7 years and older without a physician's prior order. The Texas Federation of Chain Drug Stores stated the rule should not require patients to be 8 years of age in order to receive an influenza immunization without an established patient-physician relationship, but rather over 7 years of age. The Board agrees with these comments and deleted the language indicating that the patient must be 8 years of age.

The amendments are adopted under §§551.002, 554.051, and 554.057 of the Texas Pharmacy Act (Chapters 551 - 566 and 568

- 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.057 as authorizing the agency, with the advice of the Texas Medical Board, to adopt rules that allow a pharmacist to implement or modify a patient's drug therapy and sign prescriptions for dangerous drugs pursuant to a physician's delegation under §157.101(b-1).

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§295.13. Drug Therapy Management by a Pharmacist under Written Protocol of a Physician.

(a) Purpose. The purpose of this section is to provide standards for the maintenance of records of a pharmacist engaged in the provision of drug therapy management as authorized in Chapter 157 of the Medical Practice Act and §554.005 of the Act.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Pharmacy Act, Chapter 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) Board--The Texas State Board of Pharmacy.

(3) Confidential record--Any health-related record maintained by a pharmacy or pharmacist, such as a patient medication record, prescription drug order, or medication order.

(4) Drug therapy management--The performance of specific acts by pharmacists as authorized by a physician through written protocol. Drug therapy management does not include the selection of drug products not prescribed by the physician, unless the drug product is named in the physician initiated protocol or the physician initiated record of deviation from a standing protocol. Drug therapy management may include the following:

(A) collecting and reviewing patient drug use histories;

(B) ordering or performing routine drug therapy related patient assessment procedures including temperature, pulse, and respiration;

(C) ordering drug therapy related laboratory tests;

(D) implementing or modifying drug therapy following diagnosis, initial patient assessment, and ordering of drug therapy by a physician as detailed in the protocol; or

(E) any other drug therapy related act delegated by a physician.

(5) Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(6) Written protocol--A physician's order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas Medical Board under the Medical Practice Act.

(A) A written protocol must contain at a minimum the following:

(i) a statement identifying the individual physician authorized to prescribe drugs and responsible for the delegation of drug therapy management;

(ii) a statement identifying the individual pharmacist authorized to dispense drugs and to engage in drug therapy management as delegated by the physician;

(iii) a statement identifying the types of drug therapy management decisions that the pharmacist is authorized to make which shall include:

(I) a statement of the ailments or diseases involved, drugs, and types of drug therapy management authorized; and

(II) a specific statement of the procedures, decision criteria, or plan the pharmacist shall follow when exercising drug therapy management authority;

(iv) a statement of the activities the pharmacist shall follow in the course of exercising drug therapy management authority, including the method for documenting decisions made and a plan for communication or feedback to the authorizing physician concerning specific decisions made. Documentation shall be recorded within a reasonable time of each intervention and may be performed on the patient medication record, patient medical chart, or in a separate log book; and

(v) a statement that describes appropriate mechanisms and time schedule for the pharmacist to report to the physician monitoring the pharmacist's exercise of delegated drug therapy management and the results of the drug therapy management.

(B) A standard protocol may be used or the attending physician may develop a drug therapy management protocol for the individual patient. If a standard protocol is used, the physician shall record what deviations, if any, from the standard protocol are ordered for that patient.

(c) Physician delegation to a pharmacist.

(1) As specified in Chapter 157 of the Texas Medical Practices Act, a physician may delegate to a properly qualified and trained pharmacist acting under adequate physician supervision the performance of specific acts of drug therapy management authorized by the physician through the physician's order, standing medical order, standing delegation order, or other order or protocol.

(2) A delegation under paragraph (1) of this subsection may include the implementation or modification of a patient's drug therapy under a protocol, including the authority to sign a prescription drug order for dangerous drugs, if:

(A) the delegation follows a diagnosis, initial patient assessment, and drug therapy order by the physician;

(B) the pharmacist practices in a hospital, hospital-based clinic, or an academic health care institution; and

(C) the hospital, hospital-based clinic, or academic health care institution in which the pharmacist practices has bylaws and a medical staff policy that permit a physician to delegate to a pharmacist the management of a patient's drug therapy.

(3) A pharmacist who signs a prescription for a dangerous drug under authority granted under paragraph (2) of this subsection shall:

(A) notify the board that a physician has delegated the authority to sign a prescription for dangerous drugs. Such notification shall:

(i) be made on an application provided by the board;

(ii) occur prior to signing any prescription for a dangerous drug;

(iii) be updated annually; and

(iv) include a copy of the written protocol.

(B) include the pharmacist's name, address, and telephone number as well as the name, address, and telephone number of the delegating physician on each prescription for a dangerous drug signed by the pharmacist.

(4) The board shall post the following information on its web-site:

(A) the name and license number of each pharmacist who has notified the board that a physician has delegated authority to sign a prescription for a dangerous drug;

(B) the name and address of the physician who delegated the authority to the pharmacist; and

(C) the expiration date of the protocol granting the authority to sign a prescription.

(d) Pharmacist Training Requirements.

(1) Initial requirements. A pharmacist shall maintain and provide to the Board within 24 hours of request a statement attesting to the fact that the pharmacist has within the last year:

(A) completed at least six hours of continuing education related to drug therapy offered by a provider approved by the Accreditation Council for Pharmacy Education (ACPE); or

(B) engaged in drug therapy management as allowed under previous laws or rules. A statement from the physician supervising the acts shall be sufficient documentation.

(2) Continuing requirements. A pharmacist engaged in drug therapy management shall annually complete six hours of continuing education related to drug therapy offered by a provider approved by the Accreditation Council for Pharmacy Education (ACPE). (These hours may be applied towards the hours required for renewal of a license to practice pharmacy.)

(e) Supervision. Physician supervision shall be as specified in the Medical Practice Act, Chapter 157 and shall be considered adequate if the delegating physician:

(1) is responsible for the formulation or approval of the written protocol and any patient-specific deviations from the protocol and review of the written protocol and any patient-specific deviations from the protocol at least annually and the services provided to a patient under the protocol on a schedule defined in the written protocol;

(2) has established and maintains a physician-patient relationship with each patient provided drug therapy management by a delegated pharmacist and informs the patient that drug therapy will be managed by a pharmacist under written protocol;

(3) is geographically located so as to be able to be physically present daily to provide medical care and supervision;

(4) receives, on a schedule defined in the written protocol, a periodic status report on the patient, including any problem or complication encountered;

(5) is available through direct telecommunication for consultation, assistance, and direction; and

(6) determines that the pharmacist to whom the physician is delegating drug therapy management establishes and maintains a pharmacist-patient relationship with the patient.

(f) Records.

(1) Maintenance of records.

(A) Every record required to be kept under this section shall be kept by the pharmacist and be available, for at least two years from the date of such record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement or regulatory agencies.

(B) Records may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(i) the records maintained in the alternative system contain all of the information required on the manual record; and

(ii) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Written protocol.

(A) A copy of the written protocol and any patient-specific deviations from the protocol shall be maintained by the pharmacist.

(B) A pharmacist shall document all interventions undertaken under the written protocol within a reasonable time of each intervention. Documentation may be maintained in the patient medication record, patient medical chart, or in a separate log.

(C) A standard protocol may be used or the attending physician may develop a drug therapy management protocol for the individual patient. If a standard protocol is used, the physician shall record what deviations, if any, from the standard protocol are ordered for that patient. A pharmacist shall maintain a copy of any deviations from the standard protocol ordered by the physician.

(D) Written protocols, including standard protocols, any patient-specific deviations from a standard protocol, and any individual patient protocol, shall be reviewed by the physician and pharmacist at least annually and revised if necessary. Such review shall be documented in the pharmacist's records. Documentation of all services provided to the patient by the pharmacist shall be reviewed by the physician on the schedule established in the protocol.

(g) Confidentiality.

(1) In addition to the confidentiality requirements specified in §291.27 of this title (relating to Confidentiality) a pharmacist shall comply with:

(A) the privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and any rules adopted pursuant to this act;

(B) the requirements of Medical Records Privacy contained in Chapter 181, Health and Safety Code;

(C) the Privacy of Health Information requirements contained in Chapter 28B of the Insurance Code; and

(D) any other confidentiality provisions of federal or state laws.

(2) This section shall not affect or alter the provisions relating to the confidentiality of the physician-patient communication as specified in the Medical Practice Act, Chapter 159.

(h) Construction and Interpretation.

(1) As specified in the Medical Practice Act, Chapter 157, this section does not restrict the use of a pre-established health care

program or restrict a physician from authorizing the provision of patient care by use of a pre-established health care program if the patient is institutionalized and the care is to be delivered in a licensed hospital with an organized medical staff that has authorized standing delegation orders, standing medical orders, or protocols.

(2) As specified in the Medical Practice Act, Chapter 157, this section may not be construed to limit, expand, or change any provision of law concerning or relating to therapeutic drug substitution or administration of medication, including the Act, §554.004.

§295.15. Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician.

(a) Purpose. The purpose of this section is to provide standards for pharmacists engaged in the administration of immunizations or vaccinations as authorized in Chapter 554 of the Act.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ACPE--The Accreditation Council for Pharmacy Education.

(2) Act--The Texas Pharmacy Act, Chapter 551 - 566 and 568 - 569, Occupations Code, as amended.

(3) Administer--The direct application of a prescription drug by injection, inhalation, ingestion, or any other means to the body of a patient by:

(A) a practitioner, an authorized agent under his supervision, or other person authorized by law; or

(B) the patient at the direction of a practitioner.

(4) Antibody--A protein in the blood that is produced in response to stimulation by a specific antigen. Antibodies help destroy the antigen that produced them. Antibodies against an antigen usually equate to immunity to that antigen.

(5) Antigen--A substance "recognized" by the body as being foreign; it results in the production of specific antibodies directed against it.

(6) Board--The Texas State Board of Pharmacy.

(7) Confidential record--Any health-related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist such as a patient medication record, prescription drug order, or medication order.

(8) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch, or gateway).

(9) Immunization--The act of inducing antibody formation, thus leading to immunity.

(10) Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(11) Vaccination--Administration of any antigen in order to induce immunity; is not synonymous with immunization since vaccination does not imply success.

(12) Vaccine--A specially prepared antigen, which upon administration to a person will result in immunity.

(13) Written Protocol--A physician's order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas Medical Board under the Medical Practice Act.

(A) A written protocol must contain, at a minimum, the following:

(i) a statement identifying the individual physician authorized to prescribe drugs and responsible for the delegation of administration of immunizations or vaccinations;

(ii) a statement identifying the individual pharmacist authorized to administer immunizations or vaccinations as delegated by the physician;

(iii) a statement identifying the location(s) (i.e., address) at which the pharmacist may administer immunizations or vaccinations;

(iv) a statement identifying the immunizations or vaccinations that may be administered by the pharmacist;

(v) a statement identifying the activities the pharmacist shall follow in the course of administering immunizations or vaccinations, including procedures to follow in the case of reactions following administration; and

(vi) a statement that describes the content of, and the appropriate mechanisms for the pharmacist to report the administration of immunizations or vaccinations to the physician issuing the written protocol within the time frames specified in this section.

(B) A standard protocol may be used or the physician may develop an immunization or vaccination protocol for the individual patient. If a standard protocol is used, the physician shall record what deviations, if any, from the standard protocol are ordered for the patient.

(c) Pharmacist certification requirements. Pharmacist who enter into a written protocol with a physician to administer immunizations or vaccinations shall:

(1) complete a course provided by an ACPE approved provider which:

(A) requires documentation by the pharmacist of current certification in the American Heart Association's Basic Cardiac Life Support for Health-Care Providers or its equivalent;

(B) is an evidence-based course which:

(i) includes study material;

(ii) includes hands-on training in techniques for administering immunizations or vaccines; and

(iii) requires testing with a passing score; and

(C) meets current Center for Disease Control training guidelines and provides a minimum of 20 hours of instruction and experiential training in the following content areas:

(i) standards for pediatric, adolescent, and adult immunization practices;

(ii) basic immunology and vaccine protection;

(iii) vaccine-preventable diseases;

(iv) recommended immunization schedules (pediatric/adolescent/adult);

(v) vaccine storage and management;

(vi) informed consent;

(vii) physiology and techniques for vaccine administration;

(viii) pre and post-vaccine assessment and counseling;

(ix) immunization record management; and

(x) adverse events:

(I) identification and appropriate response; and

(II) documentation and reporting; and

(2) maintain documentation of:

(A) completion of the initial course specified in paragraph (1) of this subsection;

(B) 3 hours of continuing education every 2 years which are designed to maintain competency in the disease states, drugs, and administration of immunizations or vaccinations; and

(C) current certification in the American Heart Association's Basic Cardiac Life Support for Health-Care Providers or its equivalent.

(d) Supervision. Pharmacists involved in the administration of immunizations or vaccinations shall be under the supervision of a physician. Physician supervision shall be considered adequate if the delegating physician:

(1) is responsible for the formulation or approval of the physician's order, standing medical order, standing delegation order, or other order or protocol and periodically reviews the order or protocol and the services provided to a patient under the order or protocol;

(2) has established a physician-patient relationship with each patient under 14 years of age and referred the patient to the pharmacist; except a pharmacist may administer an influenza vaccination to a patient over seven years of age without an established physician-patient relationship;

(3) is geographically located so as to be easily accessible to the pharmacist administering the immunization or vaccination;

(4) receives, as appropriate, a periodic status report on the patient, including any problem or complication encountered; and

(5) is available through direct telecommunication for consultation, assistance, and direction.

(e) Special Provisions. Pharmacists involved in the administration of immunizations or vaccinations under their license to practice pharmacy shall meet the following restrictions and requirements.

(1) Pharmacists may only administer immunizations or vaccinations pursuant to a written protocol from a physician authorizing the administration.

(2) Pharmacists may administer immunizations or vaccinations to a patient under 14 years of age only upon a referral from a physician who has an established physician-patient relationship with each patient. However, a pharmacist may administer an influenza vaccination to a patient over seven years of age without an established physician-patient relationship.

(3) Pharmacists may administer immunizations or vaccinations under written protocol of a physician within a pharmacy or at any other location specifically identified in the written protocol. Such other location may not include where the patient resides, except for a licensed nursing home or hospital.

(4) The authority of a pharmacist to administer immunizations or vaccinations may not be delegated.

(5) Pharmacists may administer immunizations and vaccinations only when a licensed health-care provider authorized to administer the medication is not reasonably available to administer the medication. For the purpose of this section, "reasonably available" means those times when the licensed health-care provider is immediately available to administer the immunization or vaccine and is specifically tasked to do so.

(6) Under the provisions of the National Vaccine Injury Compensation Program (NVICP), the health-care provider under whose authority a covered vaccine is administered (i.e., the physician issuing the written protocol) must maintain certain information in the patient's permanent record. In order for the physician to comply with the provisions of the NVICP, the pharmacist shall provide the physician with the information specified in subsection (g) of this section.

(7) The pharmacist shall comply with all other state and federal requirements regarding immunizations or vaccinations.

(f) Drugs.

(1) Drugs administered by a pharmacist under the provisions of this section shall be in the legal possession of:

(A) a pharmacy, which shall be the pharmacy responsible for drug accountability, including the maintenance of records of administration of the immunization or vaccination; or

(B) a physician who shall be responsible for drug accountability, including the maintenance of records of administration of the immunization or vaccination.

(2) Drugs shall be transported and stored at the proper temperatures indicated for each drug.

(3) Pharmacists while actively engaged in the administration of immunizations or vaccinations under written protocol, may have in their custody and control the drugs for immunization or vaccination that are identified in the written protocol and any other dangerous drugs listed in the written protocol to treat adverse reactions.

(4) After administering immunizations or vaccinations at a location other than a pharmacy, the pharmacist shall return all unused prescription medications to the pharmacy or physician responsible for the drugs.

(g) Notifications.

(1) A pharmacist engaged in the administration of immunizations or vaccinations shall provide notification of the administration to:

(A) the physician who issued the written protocol within 24 hours of administering the immunization or vaccination; and

(B) the primary care physician of the patient, as provided by the patient or patient's agent, within 14 days of administering the immunization or vaccination.

(2) The notifications required in paragraph (1) of this subsection shall include the:

(A) name and address of the patient;

(B) age of the patient if under 14 years of age;

(C) name of the patient's primary care physician as provided by the patient or patient's agent;

(D) name, manufacturer, and lot number of the vaccine administered;

(E) amount administered;

(F) date the vaccine was administered;

(G) site of the immunization or vaccination (e.g., right arm, left leg, right upper arm);

(H) route of administration of the immunization or vaccination (e.g., intramuscular, subcutaneous, by mouth); and

(I) name, address, and title of the person administering the immunization or vaccination.

(h) Records.

(1) Maintenance of records.

(A) Every record, including notifications, required to be made under this section shall be kept by the pharmacist administering the immunization or vaccination and by the pharmacy when in legal possession of the drugs administered. Such records shall be available for at least two years from the date of such record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement or regulatory agencies.

(B) Records, including notifications, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(i) the records maintained in the alternative system contain all of the information required on the manual record; and

(ii) the data processing system is capable of producing a hard copy of the record upon request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Records of administration under written protocol.

(A) Records of administration shall be maintained by the pharmacist administering immunizations or vaccinations. Such records shall include:

(i) all of the administration record requirements of subparagraph (B) of this paragraph; and

(ii) include the name and address of the pharmacy or physician in legal possession of the immunization or vaccination administered.

(B) A pharmacy, when responsible for drug accountability, shall maintain a record of administration of immunizations or vaccinations by a pharmacist. The records shall be kept and maintained by patient name. This record shall include:

(i) a copy of the written protocol under which the immunization or vaccination was administered and any patient-specific deviations from the protocol;

(ii) name and address of the patient;

(iii) age of the patient if under 14 years of age;

(iv) name of the patient's primary care physician as provided by the patient or patient's agent;

(v) name, manufacturer, and lot number of the vaccine administered;

(vi) amount administered;

(vii) date the vaccine was administered;

(viii) site of the immunization or vaccination (e.g., right arm, left leg, right upper arm);

(ix) route of administration of the immunization or vaccination (e.g., intramuscular, subcutaneous, by mouth); and

(x) name, address, and title of the person administering the immunization or vaccination.

(3) Written protocol.

(A) A copy of the written protocol and any patient-specific deviations from the protocol shall be maintained in accordance with paragraph (2) of this subsection.

(B) A standard protocol may be used or the attending physician may develop an immunization/vaccination protocol for the individual patient. If a standard protocol is used, the physician shall record what deviations, if any, from the standard protocol are ordered for the patient. The pharmacy that is in possession of the vaccines administered shall maintain a copy of any deviations from the standard protocol ordered by the physician.

(C) Written protocols, including standard protocols, any patient-specific deviations from a standard protocol, and any individual patient protocol, shall be reviewed by the physician and pharmacist at least annually and revised if necessary. Such review shall be documented in the records of the pharmacy that is in possession of the vaccines administered.

(i) Confidentiality.

(1) In addition to the confidentiality requirements specified in §291.27 of this title (relating to Confidentiality) a pharmacist shall comply with:

(A) the privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and any rules adopted pursuant to this act;

(B) the requirements of Medical Records Privacy contained in Chapter 181, Health and Safety Code;

(C) the Privacy of Health Information requirements contained in Chapter 28B of the Insurance Code; and

(D) any other confidentiality provisions of federal or state laws.

(2) This section shall not affect or alter the provisions relating to the confidentiality of the physician-patient communication as specified in the Medical Practice Act, Chapter 159.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905291
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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Proposal publication date: October 2, 2009
For further information, please call: (512) 305-8028

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 505. THE BOARD

22 TAC §505.10

The Texas State Board of Public Accountancy adopts an amendment to §505.10, concerning Board Committees, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6810) and will not be republished.

The section establishes the Board's committees.

The amendment will define the responsibilities of the Fifth-Year Accounting Students Scholarship Program Advisory Committee.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905348
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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CHAPTER 511. ELIGIBILITY
SUBCHAPTER C. EDUCATIONAL REQUIREMENTS

22 TAC §511.58

The Texas State Board of Public Accountancy adopts an amendment to §511.58, concerning Definitions of Related Business Subjects, without changes to the proposed text as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5859) and will not be republished.

The section clarifies courses that the Board may consider in meeting the definition of business coursework for the CPA examination.

The amendment will establish the effective date for course requirements to take the CPA exam.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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CHAPTER 520. PROVISIONS FOR THE FIFTH-YEAR ACCOUNTING STUDENTS SCHOLARSHIP PROGRAM

22 TAC §520.1

The Texas State Board of Public Accountancy adopts new §520.1, concerning Authority and Purpose, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6813) and will not be republished.

The new rule will inform the public of the authority to administer and the purpose of the Fifth-Year Accounting Students Scholarship Program.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
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For further information, please call: (512) 305-7842

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22 TAC §520.2

The Texas State Board of Public Accountancy adopts new §520.2, concerning Definitions, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6814) and will not be republished.

The new rule will define the terms used in the Fifth-Year Accounting Students Scholarship Program.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency

with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905351
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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22 TAC §520.3

The Texas State Board of Public Accountancy adopts new §520.3, concerning Institutions, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6815) and will not be republished.

The new rule will inform the public and universities of the eligibility, approval, responsibilities and reporting obligations of the universities wishing to participate in the scholarship program.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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22 TAC §520.4

The Texas State Board of Public Accountancy adopts new §520.4, concerning Eligible Students, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6816) and will not be republished.

The new rule will inform interested parties of who may participate in the scholarship program.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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22 TAC §520.5

The Texas State Board of Public Accountancy adopts new §520.5, concerning Award Amounts and Uses, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6817) and will not be republished.

The new rule will establish the mechanism to determine the amount of the scholarship award and the purpose the award may be used.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
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For further information, please call: (512) 305-7842

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22 TAC §520.6

The Texas State Board of Public Accountancy adopts new §520.6, concerning Allocations and Reallocations, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6818) and will not be republished.

The new rule requires the establishment of a formula by the Board and Advisory Committee for the allocation of the scholarship program money and the requirement to establish dates for the institutions to encumber the allocations.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
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For further information, please call: (512) 305-7842

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22 TAC §520.7

The Texas State Board of Public Accountancy adopts new §520.7, concerning Disbursements to Institutions, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6819) and will not be republished.

The new rule establishes a program officer to disburse the scholarship program funds.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905356
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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22 TAC §520.8

The Texas State Board of Public Accountancy adopts new §520.8, concerning Retroactive Disbursements, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6819) and will not be republished.

The new rule creates the opportunity for a disbursement from the scholarship fund after the enrollment period.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905357
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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22 TAC §520.9

The Texas State Board of Public Accountancy adopts new §520.9, concerning Advisory Committee, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6820) and will not be republished.

The new rule creates an advisory committee to advise the Board on allocation of the scholarship fund.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905358
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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22 TAC §520.10

The Texas State Board of Public Accountancy adopts new §520.10, concerning Recognition of Accounting Firms Hiring and Offering Internships, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6821) and will not be republished.

The new rule establishes a method to provide recognition to accounting firms participating in the scholarship fund program.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905359
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 9, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 305-7842

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER O. TEXAS COMMERCIAL LINES STATISTICAL PLAN

28 TAC §5.9501

The Commissioner of Insurance adopts new Subchapter O, §5.9501, concerning the Texas Commercial Lines Statistical Plan. The new section adopts by reference the Plan, effective January 1, 2010. The new section is adopted without changes to the proposed text published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6825).

REASONED JUSTIFICATION. The new section is necessary to update and adopt by reference the Texas Commercial Lines Statistical Plan (Plan), effective January 1, 2010. Because the prior Plan was adopted in 1995, the new Plan is necessary to: (i) update obsolete reporting instructions; (ii) update the Insurance Services Office copyright notice to reflect the change from the adoption of the Plan pursuant to Articles 5.96 and 5.97 of the Insurance Code to Chapter 38, Subchapter E of the Insurance Code; (iii) update effective dates; and (iv) remove provisional instructions pertaining to the 1995 transition to the Plan. It is necessary, however, for the new Plan to retain the 1995 reporting instructions in the Run-Off Reporting Rule for each line in the event that a policy with a retrospective adjustment prior to 1995 needs to be reported. The transmittal form and affidavit, as well as the related instructions, have been deleted from the new Plan. They are no longer needed because insurers report this information on the designated statistical agent's forms.

The Plan adopted by reference in the new section incorporates the same requirements and reporting instructions for the reporting of commercial lines insurance premium and loss data to the Department as the Plan, effective January 1, 1995, with the exception of the reporting of fidelity and surety experience data. The changes to the fidelity and surety premium and loss experience reporting in the new Plan standardize the manner in which fidelity and surety insurers report premium and loss experience. These changes consist of the updating of certain coverage and class fields and codes. Pursuant to the Plan, all insurers writing direct fidelity and surety business in the State of Texas are required to submit a quarterly report of premium and loss experience. Some of the fields and codes contained in the prior Quarterly Fidelity and Surety Experience Report of the Plan were not consistent with the standard fields and codes utilized by fidelity and surety insurers to submit premium or loss experience data in other states. As a result, insurers were required to maintain two separate systems for tracking premium and loss experience data--one for Texas and one for the rest of the country.

The revisions to the Quarterly Fidelity and Surety Experience Report of the Plan reflect the fields and codes used for reporting premium or loss experience in other states. Adopting standard fields and codes eliminates the need for fidelity and surety insurers to maintain two separate databases and should, as a result, lower compliance costs, as well as allow for better experience comparison by the Department, the designated statistical agent, and the industry in general.

Additionally, the new Plan updates reporting media because technological advances have rendered diskettes obsolete in favor of CDs and DVDs as media storage mediums. The new Plan also incorporates minor changes to correct misspelled words and erroneous punctuation and to replace the references from "manual" to "Plan" for internal consistency. These changes will assist in understandability and ease of use.

The prior Plan was adopted under the procedures outlined in Articles 5.96 and 5.97 of the Insurance Code effective January 1, 1995, for mandatory use by all insurers writing commercial lines insurance in Texas. As a result of subsequent amendments to Article 5.97, which provide that Article 5.97 no longer applies to certain lines of insurance, the Plan is adopted pursuant to the Administrative Procedure Act, Government Code Chapter 2001.

The Insurance Code §38.202 provides that the Commissioner of Insurance (Commissioner) may, for a line or sub-line of insurance, designate or contract with a qualified organization to serve as the statistical agent for the Commissioner to gather data relevant for regulatory purposes. The Insurance Code §38.204(a) provides that a designated statistical agent shall collect data from reporting insurers under a statistical plan adopted by the Commissioner. The Insurance Code §38.205 requires insurers to provide all premium and loss cost data to the Commissioner or the designated statistical agent as the Commissioner or agent requires. The Insurance Code §38.207 authorizes the Commissioner to adopt rules necessary to accomplish the purposes of the subchapter regarding statistical data collection.

HOW THE SECTION WILL FUNCTION. Section 5.9501(a) sets forth the purpose and applicability of the new section. Section 5.9501(a)(1) specifies the purpose of the new section, which is to establish requirements for the reporting of premium and loss data by direct commercial lines insurers pursuant to the Insurance Code Chapter 38, Subchapter E. Section 5.9501(a)(2) specifies that, pursuant to the Insurance Code §38.202, the Commissioner has designated a statistical agent for commercial lines of insurance. Section 5.9501(a)(3) requires that, pursuant to the Insurance Code §38.205, all insurers writing direct commercial lines business in the State of Texas must provide a report of their premium and loss cost experience to the Commissioner or the statistical agent designated under the Insurance Code §38.202. Section 5.9501(a)(3) further requires that the report comply with the reporting requirements and instructions specified in the Plan, which is adopted by reference pursuant to the new §5.9501(b).

Section 5.9501(a)(4) mandates that the new section apply to all reports that are required by §5.9501 to be filed with the Department for reporting periods beginning on or after January 1, 2010.

Under the new §5.9501(b), the Plan is adopted by the Commissioner by reference, effective January 1, 2010. Section 5.9501(b) also provides that the Plan is published by the Department and is available from the Data Services Division, Mail Code 105-5D, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or the department website at www.tdi.state.tx.us.

Under the Plan adopted by reference, insurers will follow the same requirements and reporting instructions for the reporting of commercial lines insurance premium and loss data to the Department as the 1995 Plan, with the exception of the reporting of fidelity and surety experience data. Under the changes to the Quarterly Fidelity and Surety Experience Report of the Plan, insurers will report premium and loss data using updated coverage and class fields and codes that are also used in other states.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comments: All commenters express support for the proposed changes to the fidelity and surety portion of the Plan. In summary, the commenters agree that the use in Texas of the data fields and codes used for reporting premium and loss experience in other states will eliminate the need for insurers to maintain separate databases and processes and, in turn, lower compliance costs. Also, the changes will allow for better experience comparison by the Department, the designated statistical agent, and the industry in general and will, thereby, benefit the Department as well as the entire surety and fidelity industry.

Agency Response: The Department appreciates the supportive comments.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For without changes: CNA Surety, Great American Insurance Group, Liberty Mutual Surety, Merchants Bonding Company, and Old Republic Surety Company on behalf of the Fidelity and Surety Association of America.

Against: None.

STATUTORY AUTHORITY. The new section is adopted pursuant to the Insurance Code §§38.202, 38.204(a), 38.205, 38.207, and 36.001. Section 38.202 provides that the Commissioner may, for a line or sub-line of insurance, designate or contract with a qualified organization to serve as the statistical agent for the Commissioner to gather data relevant for regulatory purposes. Section 38.204(a) provides that a designated statistical agent shall collect data from reporting insurers under a statistical plan adopted by the Commissioner. Section 38.205 requires insurers to provide all premium and loss cost data to the Commissioner or the designated statistical agent as the Commissioner or agent requires. Section 38.207 authorizes the Commissioner to adopt rules necessary to accomplish the purposes of the subchapter regarding statistical data collection. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2009.

TRD-200905323
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 8, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-6327

CHAPTER 9. TITLE INSURANCE

The Commissioner of Insurance adopts amendments to §9.1 and §9.401, concerning the adoption by reference of certain amendments to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual) and to the *Texas Title Insurance Statistical Plan* (Statistical Plan). The amendments are adopted with changes to the proposed text as published in the August 21, 2009, issue of the *Texas Register* (34 TexReg 5643).

REASONED JUSTIFICATION. The amendments to the Basic Manual and Statistical Plan, which the amended sections adopt by reference, were considered at the rulemaking phase of the 2008 Texas Title Insurance Biennial Hearing (Biennial Hearing) held on October 2, 2008, Docket Number 2690. The rulemaking phase of the hearing was conducted pursuant to the Insurance Code §2703.205. At the close of the October 2 hearing, the Commissioner directed that the record be held open until October 31, 2008, in order to allow additional written comments to be submitted for all of the agenda items. In accordance with the Insurance Code §2703.205(d), the ratemaking phase of the hearing was referred to the State Office of Administrative Hearings. This adoption by reference of new rules and forms and the modification or replacement of currently existing rules and forms in the Basic Manual and Statistical Plan facilitate the administration and regulation of title insurance in the State of Texas. These amendments clarify and standardize the rules and forms regulating the writing and the business of title insurance in the State of Texas.

The amendments to the Basic Manual and Statistical Plan are identified by the item number used in the October 2 hearing. Items 2008-29, 2008-34, 2008-35, 2008-36, and 2008-45 were

approved for withdrawal from consideration during the rulemaking phase of the hearing at the request of the entities that originally filed the items for consideration.

After careful review and consideration of the filings, testimony, and comments, the Commissioner has determined that Agenda Items 2008-17 and 2008-18 should not be adopted. Item 2008-17 proposed to amend Procedural Rule P-18 to require that a copy of the Commitment for Title Insurance (T-7) on an Owner's Policy be delivered to the proposed insured as soon as practicable, but in no event later than 5 business days prior to closing the transaction unless extenuating circumstance exist. Agenda Item 2008-17 should not be adopted because the proposed change to P-18 that would require the title commitment to be delivered only to the buyer or seller would deny consumers the flexibility and right of naming an agent or attorney to receive the title commitment on their behalf. This is an option that consumers should be allowed to have because there are a number of circumstances where not having the option to appoint an agent would create a significant hardship on the consumer. Additionally, the Department agrees that imposing a requirement of delivery of the title commitment five days prior to closing could delay closing the transaction which might deny a consumer the ability to maintain his initial interest rate. Such a delay could result in adverse economic impact to consumers and losses to industry.

Item 2008-18 proposed to amend Procedural Rule P-21 to remove language from Schedule D of the Commitment for Title Insurance (T-7) regarding optional advanced disclosure of settlement charges and optional advanced issuance of a Commitment for Title Insurance. The Commissioner has determined that Item 2008-18 should not be adopted. The proposed changes to P-21 are designed to facilitate consumer comparison shopping for title insurance. There are new federal Real Estate Settlement Procedures Act of 1974 (RESPA) rules and forms (effective January 1, 2010) that provide a much more comprehensive methodology to facilitate consumer comparison shopping for a loan among competing loan originators than the proposed changes to P-21 in Item 2008-18. It would not be prudent to adopt the proposed changes to P-21 because they involve some of the very same disclosures and estimates that will be mandated under the new federal RESPA rules. The new RESPA rules include estimates for title insurance and title services and there is a high probability for conflict between the proposed changes to P-21 in Item 2008-18 and the new federal RESPA rules.

The Department has made several non-substantive changes to the items adopted by reference. None of these changes, however, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. The Department has also made changes to the items adopted by reference to correct statutory references, typographical errors, and formatting errors. Additionally, in response to comments, the Department has made the following non-substantive changes to the items adopted by reference:

Item 2008-5 - The Department has changed P-9.b(6) concerning variable rate mortgage loan instruments in response to comment. On the second line, a quotation mark has been added to precede the word variable to properly set off the term "variable rate mortgage."

Item 2008-9 - The Department has included changes in response to comments to Form T-1R Texas Residential Owner's Policy of Title Insurance-One to Four Family Residences, Form T-2R Texas Short Form Residential Loan Policy of Title Insurance and Form T-13 Loan Title Policy Binder On Interim Construction Loan. All references in the policies to "mortgagee" were changed to "loan" and all references in the policies to "owner" were changed to "owner's."

Item 2008-14 - Since Item 2008-14 was filed, the Texas Legislature passed HB 3073 into law that enacts new §2501.008 of the Insurance Code. The Department has amended Item 2008-14 to conform with the newly enacted §2501.008 of the Insurance Code by including a "reasonable estimate of charges" such that section (g) would read:

"Due to the higher level of security and expedited recording time afforded by electronically filing or recording instruments, promulgated forms or other documents incident to real or personal property transactions, the actual charges or a reasonable estimate of charges, including actual charges or a reasonable estimate of charges by a trusted third-party provider to an authorized filer, for electronically filing or recording (e-filing) such instruments, forms or documents may be passed through to the consumer. Such actual charges or reasonable estimate of charges may not be marked up."

Item 2008-24 - The item proposed for adoption represents the original version of the "Insured Closing Service (T-50) form, not the amended version that was filed on September 19, 2008. The Department intended that the amended version of the "Insured Closing Service (T-50) form that was filed on September 19, 2008 should be adopted in lieu of the original version. The amended version of the Insured Closing Service (T-50) form filed on September 19, 2008, would make four changes to the proposed Insured Closing Service (T-50) form in Item 2008-24. The four changes are as follows: (i) change the caption of the form to state "Insured Closing Service" so that it is consistent with the title of the form; (ii) delete "negligence" in paragraph 2 of the covered matters section of the form so that it is consistent with the amended item filed on September 19, 2008; (iii) delete the reference to borrower in the succeeding sentence of paragraph 2 of the covered matters section of the form since the applicable form for the buyer where appropriate would be form (T-51); and (iv) delete the reference to purchase or lease in paragraph 1.C. of the Conditions and Exclusions, because of the availability of a separate form (T-51) for the buyer.

Item 2008-25 - The Department has adopted the amended version of the Co-Insurance Endorsement Form (T-48) in lieu of the original version that was proposed. The Department inadvertently proposed the original version. The purpose of this item is to revise the existing Co-Insurance Endorsement Form (T-48) to conform with the American Land Title Association (ALTA) form. The amended version more accurately reflects the changes needed to conform the existing form to the ALTA form.

Item 2008-28 - The Department has added in the next to last line of P-55 the parenthetical "(Mezzanine Financing)" and changed the italics to regular font for purposes of consistency and clarity.

Item 2008-40 - The Department has adopted the amended version of Item 2008-40 dated November 2, 2008 in lieu of the original version that was proposed. The Department inadvertently proposed the original version. The purpose of this item is to clarify the issues relating to property taxes and insuring those taxes in the title insurance policy. The version that was submitted by the commenter provides the best clarification of the issues by describing common fact patterns involving property taxes and providing underwriting guidelines for providing title insurance coverage. This item amends Procedural Rule P-20 titled Amendment of Standard Exception in Mortgagee Policy or Mortgagee Title

Policy Binder on Interim Construction Loan (Interim Binder) Relating to Taxes to organize procedural rules regarding the standard tax exception and Bulletin 153 into one rule. This item provides guidance to the title industry regarding current year and rollback taxes and it merges Procedural Rule 29, titled Amendment of Standard Exception in Mortgagee Policy Binder on Interim Construction Loan (Interim Binder) Relating to Taxes Not Yet Due and Payable to make it a part of Procedural Rule P-20 subsection C.

Item 2008-54 - The Department has added the following to the Statistical Plan:

1. Added a Note 6 to Table 1 concerning personal property title insurance transactions.

2. Added reporting codes for the new Texas Limited Coverage Residential Chain of Title Policy Form (T-53).

3. Added reporting codes for the new Minerals and Surface Damage Endorsements (T-19.2 and T-19.3).

4. Added new reporting codes for the Restrictions, Encroachments, Minerals Endorsement-Owner's Policies (T-19.1).

5. Added new reporting codes for the Non-Imputation Endorsement (Mezzanine Financing) (T-24.1).

6. Added new reporting codes for the Contiguity Endorsement (T-25.1).

These changes were made in response to comments and were necessary to accomplish the statistical reporting needed for the new Texas Limited Coverage Residential Chain of Title Policy Form (T-53), the new Minerals and Surface Damage Endorsements (T-19.2 and T-19.3), the Restrictions, Encroachments, Minerals Endorsement-Owner's Policies (T-19.1), the Non-Imputation Endorsement (Mezzanine Financing) (T-24.1), and the Contiguity Endorsement (T-25.1).

In response to comments, the Department has revised the effective date of the adoption by reference of the Basic Manual and Statistical Plan in §9.1 and §9.401. The items adopted by reference include typographical corrections and other changes based on public comments. The effective date of the adopted amendments to §9.1 and §9.401 is February 1, 2010.

HOW THE SECTIONS WILL FUNCTION. The amendments to §9.1 and §9.401 revise the effective date of the amended Basic Manual and Statistical Plan. The items which are the subject of this adoption are as follows:

Item 2008-1 - Adoption of an amendment to the Residential Real Property Affidavit (Form T-47) to remove a duplicate reference to the title insurance company in paragraph 6 of the form.

Item 2008-2 - Adoption of an amendment to Procedural Rule P-36 to allow for the deletion of the arbitration provision on Schedule A of the Loan Policy or the Owner's Policy and to amend outmoded references to the Mortgagee and Owner Policy forms.

Item 2008-3 - Adoption of an amendment to Procedural Rule P-21 to conform the language of the rule with the language of the form by amending outmoded references relating to the Mortgagee and Owner Policy forms and to amend an outmoded reference to the State Board of Insurance.

Item 2008-4 - Adoption of an amendment to Procedural Rule P-9.b(8) to conform the language of the rule with the proposed Future Advance/Revolving Credit Form (T-35) and to delete the requirement that the Loan Policy show by endorsement that the lien being insured secures a revolving credit type of indebtedness.

Item 2008-5 - Adoption of an amendment to Procedural Rule P-9.b(6) to conform the language of the rule with the language of the Variable Rate Mortgage Endorsement (T-33) and the Variable Rate Mortgage-Negative Amortization Endorsement (T-33.1).

Item 2008-6 - Adoption of a new form to provide for a Limited Coverage Residential Chain of Title Policy (T-53).

Item 2008-7 - Adoption of a new Procedural Rule (P-71) relating to the Limited Coverage Residential Chain of Title Policy (T-53).

Item 2008-8 - Adoption of an amendment to the Assignment of Rents/Leases Endorsement (T-27) to correct typographical errors.

Item 2008-9 - Adoption of an amendment to the Texas Residential Owner Policy of Title Insurance - One-To-Four Family Residences (T-1R), the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R), and the Mortgagee Title Policy Binder on Interim Construction Loan (T-13) to conform with the language of the Owner's Policy (T-1) and the Loan Policy (T-2) by changing the term "Owner" to "Owner's" and changing the term "Mortgagee" to "Loan."

Item 2008-10 - Adoption of an amendment to Procedural Rule P-7 to change the language in paragraphs B and C to conform with the language of the Owner's Policy (T-1) and the Loan Policy (T-2) and the proposed changes to the Texas Residential Owner Policy of Title Insurance - One-To-Four Family Residences (T-1R), the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R), and the Mortgagee Title Policy Binder on Interim Construction Loan (T-13).

Item 2008-11 - Adoption of an amendment to Schedule B of the Loan Policy (T-2) to correct a typographical error.

Item 2008-12 - Adoption of an amendment to Schedule A of the Loan Policy (T-2) to remove the Tax Deletion Endorsement (T-30) from the list of optional endorsements on Schedule A and to remove language from Schedule A regarding deleted provisions from affected endorsements, which will require such deletions to be included as a special exception on Schedule B of the commitment.

Item 2008-13 - Adoption of an amendment to the Deletion of Arbitration Provision of the Commitment for Title Insurance (T-7) to increase the threshold amount for arbitral matters to $2 million in conformity with Procedural Rule P-36.

Item 2008-14 - Adoption of an amendment to Procedural Rule P-17 to allow a pass-through to consumers of electronic filing fees in accordance with HB 3073, as enacted by the 81st Legislature, Regular Session, effective January 1, 2010.

Item 2008-15 - Adoption of an amendment to Specific Areas and Procedures 5 of the *Minimum Standards* to allow a pass-through to consumers of tax search service fees and certain notary fees in accordance with HB 3073, as enacted by the 81st Legislature, Regular Session, effective January 1, 2010.

Item 2008-16 - Adoption of an amendment to the Commitment for Title Insurance (Form T-7) to conform the language of the form with the changed name of the policies referenced therein.

Item 2008-19 - Adoption of an amendment to the Owner's Policy of Title Insurance (T-1) to remove indemnity language from the form in conformity with the 2006 ALTA Owner's Policy.

Item 2008-20 - Adoption of an amendment to the Loan Policy of Title Insurance (T-2) to remove indemnity language from the form in conformity with the 2006 ALTA Loan Policy.

Item 2008-21 - Adoption of a new form (T-24.1) titled Non-Imputation Endorsement (Mezzanine Financing) to allow non-imputation coverage provided in paragraph 4 of the Owner's Policy to be assigned by the Insured to a Mezzanine Lender.

Item 2008-22 - Adoption of new Procedural Rule (P-69) titled *Issuance of Insured Closing Letters* to prohibit the issuance of Insured Closing Letter by attorneys operating pursuant to Procedural Rule P-22.

Item 2008-23 - Adoption of new Procedural Rule (P-70) titled, *Cancellation Fees; Fees for Services Rendered,* to define and prohibit cancellation fees and to otherwise allow fees for furnishing title evidence or furnishing title evidence and examination.

Item 2008-24 - Adoption of an amendment to the Insured Closing Service form (T-50) to substantially conform to the ALTA Standard Closing Protection Letter except that it is proposed to maintain the current two year coverage period.

Item 2008-25 - Adoption of an amendment to the Co-Insurance Endorsement (T-48) to substantially conform to the ALTA Standard Co-Insurance - Single Policy Endorsement.

Item 2008-26 - Adoption of the rescission of the Last Dollar Endorsement (T-15) in its entirety.

Item 2008-27 - Adoption of the amendment to Procedural Rule P-9 to rescind the procedure for issuance of the Last Dollar Endorsement (T-15), which has also been proposed for rescission.

Item 2008-28 - Adoption of the amendment to P-55 to provide that the Non-Imputation Endorsement (Mezzanine Financing)(T-24.1) be issued in accordance with the same procedural provisions currently set forth by the rule for the Non-Imputation Endorsement (T-24).

Item 2008-30 - Adoption of the amendment to Administrative Rule L-1 to provide that a Title Insurance Company may cancel an agent's license for cause without giving the required advance notice of 30 days. The Department adopts the modification of the notice provisions to add a new requirement to specify that if the company is the sole underwriter at the time of cancellation then the company must submit an orderly plan for the winding down of the title agent's operations that is in compliance with Administrative Rule D-1.

Item 2008-31 - Adoption of the amendment to the Future Advance/Revolving Credit Endorsement (T-35) to substantially conform the language of the endorsement to the ALTA Future Advance Endorsement and to conform the language of the endorsement to the Loan Policy (T-2).

Item 2008-32 - Adoption of the amendment to the Leasehold Loan Policy Endorsement (T-5) to conform the language of the endorsement to the ALTA Leasehold Loan Endorsement and to conform the language of the endorsement to the Loan Policy (T-2).

Item 2008-33 - Adoption of the amendment to the Leasehold Owner's Policy Endorsement (T-4) to conform the language of the endorsement to the ALTA Leasehold Owner's Endorsement and to conform the language of the endorsement to the Owner's Policy (T-1).

Item 2008-37 - Adoption of the amendment to Procedural Rule P-54, titled *Access Endorsement,* to authorize issuance of the Access Endorsement (T-23) and to remove redundant language.

Item 2008-38 - Adoption of the amendment to Procedural Rule P-56 pertaining to the Contiguity Endorsement (T-25) to include new requirements for new Contiguity Endorsement (T-25.1) that insures against loss or damage sustained by reason of the presence of any gaps, strips, or gores lying between contiguous parcels of insured lands and does not require the contiguous boundary lines of the various parcels of land to be specifically identified. The Department has amended new subsection D. by adding the clarifying language "non-residential" in two places to ensure that it is clear that the new Contiguity Endorsement (T-25.1) would only apply to non-residential property.

Item 2008-39 - Adoption of a new Contiguity Endorsement (T-25.1) to insure against loss or damage sustained by reason of the presence of any gaps, strips, or gores lying between contiguous parcels of insured lands and that does not require the contiguous boundary lines of the various parcels of land to be specifically identified.

Item 2008-40 - Adoption of an amendment to Procedural Rule P-20 Amendment of Standard Exception in Mortgagee Policy or Mortgagee Title Policy Binder on Interim Construction Loan (Interim Binder) Relating to Taxes to organize procedural rules regarding the standard tax exception and Bulletin 153 into one Procedural Rule. This submission makes the information more user friendly and easier to find and provides guidance to a Company as to what may or may not be done regarding the standard tax exception and the practice of ensuring taxes are paid. The submission that is adopted is dated November 2, 2008 (the "November amendment"), and is an amended submission that was submitted as a comment. The comment noted that the September 29, 2008, version was superseded by the November 2, 2008, version which best reflects the agreement of the parties. The November amendment deleted subparagraphs B.2.(i), (ii), and (iii) from the September 28, 2008, version. This is needed because the deleted subparagraphs refer to escrowing funds against a future possibility concerning payment of roll back taxes, and the consequences cannot be determined at the time of escrow and closing. The reference to subparagraph (2) in subparagraph A.1.b.(2) is corrected to refer to subparagraph "(1) above." The reference to Form "T-1" in subparagraph B.1.(a) is corrected to refer to Form "T-2 or T-2R" and a similar change from "Form T-1" to "Form T-2" is made in paragraph C.

The submission merges Procedural Rule 29, titled Amendment of Standard Exception in Mortgagee Policy Binder on Interim Construction Loan (Interim Binder) Relating to Taxes Not Yet Due and Payable to make it a part of Procedural Rule P-20 subsection C. Additionally, a conforming change has been made to the title of Rate Rule R-24. Currently, the title of Rate Rule R-24 reads "Applicable only as provided in Procedural P-29." The title is amended to read "Applicable only as provided in Procedural P-20C" because Procedural Rule P-29 has been merged with Procedural Rule P-20.

Item 2008-41 - Adoption of an amendment to the Title Insurance Agent (L-1) administrative rule in Section VI of the Basic Manual to update statutory references in the rule.

Item 2008-42 - Adoption of an amendment to the Audit and Review of the Agent/Direct Operations Escrow and Trust Accounts (G.2) administrative rule in Section VI of the Basic Manual to update statutory references in the rule.

Item 2008-43 - Adoption of an amendment to the Policy Guaranty Fee Remittance (T-G1) form in Section V of the Basic Manual to update the policy guaranty fee amount shown on the remittance form to reflect the correct amount due for each policy.

Item 2008-44 - Adoption of an amendment to the Requirements for Ceasing Operation by Agents and Direct Operations (D-1) administrative rule in Section VI of the Basic Manual to clarify the requirements of ceasing operation by agents or direct operations and to update statutory references in the rule.

Item 2008-46 - Adoption of an amendment to the Reasonable Time for Furnishing Title Evidence (P-25) procedural rule in Section IV of the Basic Manual to provide a requirement for title agents and direct operations to maintain auditable records and documents that demonstrate compliance with the rule and to update statutory references in the rule.

Item 2008-47 - Adoption of the amendment to the Statement of Assessment Received from and Recoupments Distributed to Title Insurance Company (T-G3) form in Section V of the Basic Manual.

Item 2008-48 - Adoption of the amendment to the Guaranty Assessment Recoupment Charge Remittance (T-G2) form in Section V of the Basic Manual.

Item 2008-49 - Adoption of the amendment to the Supplemental Coverage Manufactured Housing Unit Endorsement (T-31.1) in Section II of the Basic Manual to remove a reference to "serial number" in the form and to insert a reference to the "policy number."

Item 2008-50 - Adoption of the amendment to the Leasehold Mortgagee Policy

Endorsement (T-5) in Section II of the Basic Manual to remove a reference to "serial number" in the form.

Item 2008-51 - Adoption of the amendment to the Leasehold Owner Policy Endorsement (T-4) in Section II of the Basic Manual to remove a reference to "serial number" in the form.

Item 2008-52 - Adoption of the amendment to the Policy Guaranty Fee (G.1) administrative rule in Section VI of the Basic Manual to update statutory references in the rule.

Item 2008-53 - Adoption of the amendment to the Title Insurance Escrow Officer (L-2) rule in Section VI of the Basic Manual to provide a procedure for a title agent or direct operation to notify the Department upon a change of name of a licensed escrow officer and to update statutory references in the rule.

Item 2008-54 - Adoption of the amendments to the Statistical Plan to provide Rate Code references and to add statistical reporting codes for the following: (i) new Co-Insurance Endorsement (T-48), (ii) new personal property title insurance forms and endorsements, (iii) new Texas Limited Coverage Residential Chain of Title Policy Form (T-53), (iv) new Minerals and Surface Damage Endorsements (T-19.2 and T-19.3), (v) the Restrictions, Encroachments, Minerals Endorsement-Owner's Policies (T-19.1), (vi) the new Non-Imputation Endorsement (Mezzanine Financing) (T-24.1), and (vii) the new Contiguity Endorsement (T-25.1).

The following items have been withdrawn:

Item 2008-29 - Submission to amend the Texas Title Insurance Information form to increase the threshold amount for arbitral matters to $2 million and to conform the language of the form to the Owner's Policy (T-1), the Loan Policy (T-2), and the Deletion of the Arbitration Provision (P-36).

Item 2008-34 - Submission to propose a new Tax Parcel Endorsement covering a single tract.

Item 2008-35 - Submission to propose a new Tax Parcel Endorsement covering multiple tracts.

Item 2008-36 - Submission to amend Procedural Rule P-9 to authorize a title company to issue the Tax Parcel Endorsements.

Item 2008-45 - Submission to amend P-24 to clarify payments for services rendered among title agents, companies and direct operations.

The Department has filed a copy of each of the items adopted by reference with the Secretary of State's Texas Register Section. Persons desiring copies of the adopted items may obtain them from the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78701-3938. To request copies, please contact Sylvia Gutierrez at (512) 463-6327.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General

Comment: Commenters request that the Commissioner allow for an implementation period between the adoption date and the effective date of the rules and forms. The commenters note that a simultaneous effective date and adoption date will make implementation and compliance very difficult. An effective date of at least 60 days after the date of adoption would be prudent, to allow for title agents and underwriters to produce new forms and update software to accommodate the new rules.

Agency Response: The Department agrees that providing 60 days lead time for underwriters to produce new forms and update software to accommodate the new rules is reasonable. The effective date of the adoption will be February 1, 2010, in order to provide sufficient transition time.

Item 2008-5

Comment: One commenter notes that the amendment of P-9.b(6) on the second line, a quotation mark should precede the word variable to properly set off the term "variable rate mortgage."

Agency Response: The Department agrees that a quotation mark should precede the word variable and has made this correction.

Item 2008-14

Comment: Commenters note that since Item 2008-14 was filed, the Texas Legislature passed HB 3073 into law that enacts new §2501.008 of the Insurance Code. The commenter recommends that Item 2008-14 be amended to conform with the statute by including a "reasonable estimate of charges" such that section (g) would read: "Due to the higher level of security and expedited recording time afforded by electronically filing or recording instruments, promulgated forms or other documents incident to real or personal property transactions, the actual charges or a reasonable estimate of charges, including actual charges or a reasonable estimate of charges by a trusted third-party provider to an authorized filer, for electronically filing or recording (e-filing) such instruments, forms or documents may be passed through to the consumer. Such actual charges or reasonable estimate of charges may not be marked up."

Agency Response: The Department has conformed the language in P-17 with the changes enacted in HB 3073 in new §2501.008 of the Insurance Code.

Item 2008-17

Comment: Many commenters state positions in opposition to the adoption of Item 2008-17.

The commenters note that a proposed change to P-18 deletes the provision which allows the title commitment to be delivered to an authorized agent or attorney. This change would require the title commitment to be delivered only to the buyer or seller. The commenters note that deleting this provision denies consumers the flexibility and right of naming an agent or attorney to receive the commitment on their behalf which is an option that consumers should be allowed to have because there are a number of circumstances where not having the option to appoint an agent to receive the title commitment would create a significant hardship on the consumer.

Many commenters state positions in opposition to the proposed changes to P-18 that would require the title commitment be delivered not later than 5 business days prior to closing unless extenuating circumstances exist. The commenters note that the reasons set forth for these changes to P-18 are that fiduciaries allegedly fail to inform their clients that the cost of some items listed in the title commitment may be negotiable and therefore the option of having the fiduciaries take delivery of the commitment on behalf of the insured must be eliminated. The commenters assert that there was no evidence in the record to support that fiduciaries were in fact breaching their duty and further the commenters disputed that certain charges listed in the title commitment are negotiable just because they are not subject to a promulgated rate.

Many commenters further stated that the proposed changes to P-18 are inconsistent and contradictory to the "One to Four Family Residential Contract (Resale) promulgated by the Texas Real Estate Commission (TREC). The TREC contract sets out the terms of delivery and timetable for delivery for the title commitment and these terms are negotiated by the parties to reflect the practical timing suitable to each transaction. Imposing a requirement of delivery of the title commitment 5 days prior to closing could delay closing the transaction which might deny a consumer the ability to maintain his initial interest rate which could result in adverse economic impact to consumers and losses to industry.

The commenter acknowledges the attempt to remedy the inflexibility of the 5 day requirement by adding the language "unless extenuating circumstances exist." The commenter notes that the addition of this language does not remedy the inflexibility of the 5 day requirement because the term "extenuating circumstances" is not defined and is ambiguous.

Agency Response: The Department declines to adopt the proposed changes to P-18. The Department agrees that the proposed change to P-18 that would require the title commitment to only be delivered to the buyer or seller would deny consumers the flexibility and right of naming an agent or attorney to receive the title commitment on their behalf. This is an option that consumers should be allowed to have because there are a number of circumstances where not having the option to appoint an agent would create a significant hardship on the consumer.

The Department also declines to adopt the proposed change to P-18 that would require the title commitment be delivered not later than 5 business days prior to closing unless extenuating circumstances exist. The Department agrees that imposing a requirement of delivery of the title commitment 5 days prior to closing could delay in closing the transaction which might deny a consumer the ability to maintain his initial interest rate. Such a delay in closing the transaction could result in adverse economic impact to consumers and losses to industry.

Item 2008-18

Comment: Commenters recommend not adopting Item 2008-18 because there are new federal rules that are being implemented pursuant to amendments to the Real Estate Settlement Procedures Act of 1974 (RESPA) effective January 1, 2010 that have a high potential of conflicting with the proposed changes to P-21. One commenter believes that no changes should be made to the current Schedule D and that the recently enacted new RESPA rules adequately deal with the disclosure of non-title charges.

Agency Response: The Department agrees that Item 2008-18 should not be adopted. There are new federal rules that are being implemented pursuant to amendments to RESPA that require new standardized forms of the Good Faith Estimate of settlement charges and the HUD-1 uniform settlement statement be placed in service effective January 1, 2010 in addition to several other procedural modifications. These new rules require that (i) "loan originators" (mortgage lenders and mortgage brokers) issue to consumers within three business days after loan application, a revised Good Faith Estimate (GFE) that is intended to disclose accurate costs of closing and key loan terms in a form that may be used by consumers to comparison shop for a loan among competing loan originators during a minimum 10-business-day period in which certain of the costs must be made available for acceptance by the consumer without change or within tolerances for accuracy; and (ii) settlement agents, which in Texas include licensed escrow officers, must complete a revised form of the HUD-1 uniform settlement statement for home loan transactions based on information provided by the loan originator that compares costs actually charged at closing, including all loan originator compensation, with like cost estimated on the GFE. Notably, actual loan originator charges at closing may not exceed estimates disclosed by the GFE and the total of certain other charges, which includes title services and title insurance among others, cannot exceed the total estimates on the GFE for those same charges.

In Item 2008-18, the proposed changes to P-21 are designed to facilitate consumer comparison shopping for title insurance. The new federal rules and forms provide a comprehensive approach to facilitate consumer comparison shopping for a loan among competing loan originators (that includes estimates for title insurance and title services) than the proposed changes to P-21. It would not be prudent to adopt the proposed changes to P-21 because they involve some of the very same disclosures and estimates that will be mandated under the new federal RESPA rules and the potential for conflict between the proposed changes to P-21 and the new federal rules is great. The prudent course of action is to monitor the implementation of the federal rules before considering any changes to P-21 and to make such changes in response to well documented problems that occur after the implementation of the new federal RESPA rules.

Items 2008-19 and 2008-20

Comment: Many commenters state positions in opposition to the adoption of Agenda Items 2008-19 and 2008-20 that remove the title insurer’s right to seek reimbursement for defense costs from the insured in instances where there has been a reserva-

tion of rights and where in the course of providing a defense the court holds that there is no coverage. Item 2008-19 pertains to the Owner's Policy of Title Insurance (T-1) subsections 5(c) and 6(c) and Item 2008-20 pertains to Loan Policy of Title Insurance (T-2) subsections 5(c) and 6(c). Commenters assert that it is good public policy for title insurers to have the right to sue their insureds for defense costs in instances where a defense has been provided and the court finds that there is no coverage. The commenters' reasons for asserting that this is good public policy are that (i) if an insured requests a defense under the title policy and the claim proves to be unsuccessful then the insured should be responsible for the prosecution or defense of the claim; and (ii) if the title insurer pays claims where the defense of the claim was unsuccessful then these added expenses will increase title insurance rates for all rate payers. The commenters also made several observations concerning the Texas Supreme Court case *Excess Underwriter's At Lloyd's London v. Frank's Casing Crew and Rental Tools, Inc.* 256 S.W. 3d 42 (Tex. 2008) (hereafter *Frank's Casing*) that was cited as support for adoption of Items 2008-19 and 2008-20. The commenters believe that *Frank's Casing* fell short of suggesting a prohibition against the insurer's right to seek reimbursement from the insured for defense costs. The commenters also note that under *Frank's Casing* there must be express language in the policy to establish the right to seek reimbursement from the insured for defense costs as there is no such right under equitable theories of law.

Agency Response: The Department disagrees that it is good public policy to allow an insurer to seek reimbursement from the insured for defense costs. When a title company issues a policy it is binding itself to defend the insured if another party asserts superior title to the property and to pay the loss to the insured if the claim to superior title is upheld. The duty to defend the insured against a claim of superior title is one of the most important rights that the insured has under the title policy. However, the reasonable expectations of the insured do not include that if the insurer provides a defense and the defense proves to be unsuccessful that the insurer can then file suit against the insured to be reimbursed for the defense cost.

In the *Frank's Casing* case the court noted that there is a very difficult dilemma faced by both insurer and insured when the coverage under the policy is uncertain. The court concluded that the risk of coverage uncertainties was best placed with the insurer and not the insured. The court pointed out that a contractual right to reimbursement for defense costs that allows an insurer to pay defense costs and then sue the policyholder fosters conflict and distrust in the relationship between and insurer and its insured which is clearly not good public policy. The court also notes that the fiduciary relationship between insurer and insured is fraught with conflicting interests and that the right of an insurer to sue its own insured could be interpreted by an insurer as a judicial sanction to breach the policy of insurance which is also not good public policy.

Additionally, there are other coverage forms such as liability policies that also contain a duty to defend. Defense against liability claims is a very important coverage that has historically been in a liability policy and the insured needs and expects this coverage. If the Department reviews a liability policy that contains a duty to defend which gives the insurer the right under the policy to obtain reimbursement for defense costs for all amounts paid for which there is no coverage, such a policy would not be looked upon with favor in Texas.

Item 2008-24

Comment: One commenter notes that the item proposed for adoption appears to represent the original version of the Insured Closing Service (T-50) form, not the amended version that was filed on September 19, 2008. The commenter requests that the Commissioner adopt the amended version in lieu of the original version. The amended version of the Insured Closing Service (T-50) form filed on September 19, 2008, would make four changes to the proposed Insured Closing Service (T-50) form in Item 2008-24. The four changes are as follows: (i) change the caption of the form to state "Insured Closing Service" so that it is consistent with the title of the form; (ii) delete "negligence" in paragraph 2 of the covered matters section of the form so that it is consistent with the amended item filed on September 19, 2008; (iii) delete the reference to borrower in the succeeding sentence of paragraph 2 of the covered matters section of the form since the applicable letter for the buyer where appropriate would be form (T-51); and (iv) delete the reference to purchase or lease in paragraph 1.C. of the Conditions and Exclusions, because of the availability of a separate form (T-51).

Agency Response: The Department agrees that the amended version of the Insured Closing Service (T-50) form that was filed on September 19, 2008, and was discussed at the hearing should be adopted in lieu of the original version. The Department inadvertently proposed the original version. The purpose of this item is to conform the Insured Closing Service (T-50) form with the American Land Title (ALTA) form. The amended version more accurately reflects the changes needed to conform the existing form to the ALTA form.

Item 2008-25

Comment: Commenters note that the item proposed for adoption appears to represent the original version of the Co-Insurance Endorsement Form (T-48), not the amended version that was filed on September 19, 2008. The commenter requests that the Commissioner adopt the amended version in lieu of the original version.

Agency Response: The Department agrees that the amended version of the Co-Insurance Endorsement Form (T-48) should be adopted in lieu of the original version. The Department inadvertently proposed the original version. The purpose of this item is to revise the existing Co-Insurance Endorsement Form (T-48) to conform with the ALTA form. The amended version more accurately reflects the changes needed to conform the existing form to the ALTA form.

Item 2008-28

Comment: One commenter recommends that for consistency and clarity of reference in the next to last line of P-55 the parenthetical "(Mezzanine Financing)" be added.

Agency Response: The Department agrees that the parenthetical "(Mezzanine Financing)" should be added to provide clarity and consistency.

Item 2008-31

Comment: One commenter offers a "clean" version of Item 2008-31, the Leasehold Loan Policy Endorsement (T-5) for adoption to correctly reflect additional wordings and deletions that were made in the original submission.

Agency Response: The Department proposed the version of Item 2008-31 that was filed on September 19, 2008. The proposed version has identical wording to the "clean" version

offered by the commenter and therefore Item 2008-31 will be adopted without change to the proposal.

Item 2008-32

Comment: One commenter offers a "clean" version of Item 2008-32, the Leasehold Loan Policy Endorsement (T-5) for adoption to correctly reflect additional wordings and deletions that were made in the original submission.

Agency Response: The Department proposed the version of Item 2008-32 that was filed on September 19, 2008. The proposed version has identical wording to the "clean" version offered by the commenter and therefore Item 2008-32 will be adopted without change to the proposal.

Item 2008-33

Comment: One commenter offers a "clean" version of Item 2008-33, the Leasehold Owner's Policy Endorsement (T-4) for adoption to correctly reflect additional wordings and deletions that were made in the original submission.

Agency Response: The Department proposed the version of Item 2008-33 that was filed on September 19, 2008. The proposed version has identical wording to the "clean" version offered by the commenter and therefore Item 2008-33 will be adopted without change to the proposal.

Item 2008-40

Comment: One commenter notes that the item proposed for adoption appears to represent the original version of Item 2008-40 except that paragraph D has been deleted. The commenter has submitted an amended version dated November 2, 2008, that was negotiated by the interested parties. The commenter requests that the Commissioner adopt the amended version that was submitted by the commenter in lieu of the original version that was proposed.

Agency Response: The Department agrees that the amended version dated November 2, 2008, that was submitted by the commenter and was negotiated by the interested parties should be adopted in lieu of the original version. The purpose of this item is to clarify the issues relating to property taxes and insuring those taxes in the title insurance policy. The submission merges Procedural Rule 29, titled Amendment of Standard Exception in Mortgagee Policy Binder on Interim Construction Loan (Interim Binder) Relating to Taxes Not Yet Due and Payable to make it a part of Procedural Rule P-20 subsection C. This submission makes the information more user friendly and easier to find and provides guidance to a Company as to what may or may not be done regarding the standard tax exception and the practice of ensuring taxes are paid. The November 2, 2008, version that was submitted by the commenter provides the best clarification of the issues by describing common fact patterns involving property taxes and providing underwriting guidelines for providing title insurance coverage.

Item 2008-44

Comment: A commenter recommends that this item that relates to a new wind down procedure for insolvent title agents not be adopted because of the comprehensive Title Agency Insolvency Bill (HB 4338) which was enacted during the 81st Legislative Session. The commenter believes that HB 4338 is a comprehensive approach to address title agents who are exiting the Texas market and that the provisions of Item 2008-44 are not needed. The commenter further points out that some of the language was not in the item at the 2008 Biennial Hearing and that this new language needs further discussion.

Agency Response: The Department does not agree that the newly enacted provisions of HB 4338 address the need for a wind down procedure for title agents that fail to wind down their own operations. While HB 4338 provides several provisions that would help to ensure adequate capitalization of title agents it does not provide any procedures or guidance in the event that a title agent ceases operation and fails to wind down its own operations and it becomes necessary for the underwriter to step in and wind down the title agent's unfinished business.

Item 2008-44

Comment: One commenter notes that a title agent who is ceasing operations but is failing to wind down its own operations is required to surrender all of its files including the pending files and the closed files to the underwriter. The commenter asserts that there is no reason for the title agent to surrender the closed files to the underwriter since the underwriter has a copy of the policy that was sent with the underwriter's portion of the premium. The commenter believes that the closed files have a market value and that the title agent should be able to retain the closed files as an asset that might be sold to pay the cost of the final audit and accounting. The commenter further believes that the surrender of the pending files and commitments to the underwriter would cause a total loss to the title agent who might be able to use the value of the commitments to negotiate a modest split of the premium with another company who would close the transaction and the premium received might allow the agent to stay in business.

Agency Response:

The Department's main concern when an agent goes out of business is that claims will be handled properly by the underwriters. Proper evaluation of claims will require information from the files, not only the policies. Therefore, it is in the public's interest that the files be surrendered to the underwriter. Additionally, if the agent is already ceasing operations, it would likely no longer be licensed by the time many of the pending transactions have closed. In that situation, the agent who ceased operations would no longer be eligible to receive a premium split. Also, "pending" files sometimes only contain disputed earnest money or unclaimed escrow funds. No other agents would be interested in taking such files that may involve litigation.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For With Changes: Independent Title Agents of Texas (ITAT), Stewart Title Guaranty Company, Texas Land Title Association (TLTA), and University Title Company.

Against: None.

SUBCHAPTER A. BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS

28 TAC §9.1

The amendments are adopted pursuant to the Insurance Code §§2551.003, 2703.153, 2703.203, 2703.205 and 36.001. Section 2551.003 authorizes the Commissioner to adopt and enforce rules that prescribe underwriting standards and practices

on which a title insurance contract must be issued, that define risks that may not be assumed under a title insurance contract, including risks that may not be assumed because of the insolvency of the parties to the transaction, and that the Commissioner determines are necessary to accomplish the purposes Insurance Code Title 11, which concerns the regulation of title insurance. Section 2703.153 authorizes and requires the Commissioner to collect data from each title insurance company and title insurance agent engaged in the business of title insurance relating to loss experience, expense of operation, and other material matters necessary for the fixing of premium rates. Section 2703.203 authorizes and requires the Commissioner to hold a biennial public hearing to consider adoption of premium rates and other matters relating to regulating the business of title insurance that an association, title insurance company, title insurance agent, or member of the public requests to be considered or that the Commissioner determines necessary to consider. Section 2703.205 authorizes and requires the Commissioner to consider rules, forms, endorsements, and related matters that do not have rate implications at the rulemaking phase of the biennial public hearing. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§9.1. Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

The Texas Department of Insurance adopts by reference the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas as amended effective February 1, 2010. The document is available from and on file at the Texas Department of Insurance, Title Division, Mail Code 106-2T, 333 Guadalupe Street, Austin, Texas 78701-3938.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905285
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 6, 2009
Proposal publication date: August 21, 2009
For further information, please call: (512) 463-6327

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SUBCHAPTER C. TEXAS TITLE INSURANCE STATISTICAL PLAN

28 TAC §9.401

The amendments are adopted pursuant to the Insurance Code §§2551.003, 2703.153, 2703.203, 2703.205 and 36.001. Section 2551.003 authorizes the Commissioner to adopt and enforce rules that prescribe underwriting standards and practices on which a title insurance contract must be issued, that define risks that may not be assumed under a title insurance contract, including risks that may not be assumed because of the insolvency of the parties to the transaction, and that the Commissioner determines are necessary to accomplish the purposes Insurance Code Title 11, which concerns the regulation of title insurance. Section 2703.153 authorizes and requires the Commissioner to collect data from each title insurance company and title insurance agent engaged in the business of title insurance relating to loss experience, expense of operation, and other material matters necessary for the fixing of premium rates. Section 2703.203 authorizes and requires the Commissioner to hold a biennial public hearing to consider adoption of premium rates and other matters relating to regulating the business of title insurance that an association, title insurance company, title insurance agent, or member of the public requests to be considered or that the Commissioner determines necessary to consider. Section 2703.205 authorizes and requires the Commissioner to consider rules, forms, endorsements, and related matters that do not have rate implications at the rulemaking phase of the biennial public hearing. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§9.401. Texas Title Insurance Statistical Plan.

The Texas Department of Insurance adopts by reference the rules contained in the Texas Title Insurance Statistical Plan as amended effective February 1, 2010. This document is published by the Texas Department of Insurance and is available from the Property and Casualty Data Services Division, Mail Code 105-5D, Texas Department of Insurance, William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 6, 2009
Proposal publication date: August 21, 2009
For further information, please call: (512) 463-6327

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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 143. DISPUTE RESOLUTION REVIEW BY THE APPEALS PANEL

28 TAC §§143.2 - 143.5

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §§143.2 - 143.5 concerning Dispute Resolution Review by the Appeals Panel. Section 143.3 and §143.4 are adopted with changes to the proposed text published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 5030). Section 143.2 and §143.5 are adopted without changes and will not be republished.

In accordance with Government Code §2001.033(1), the Division's reasoned justification for these rules is set out in this order,

which includes the preamble, which in turn includes the rules. The preamble contains a summary of the factual basis of the rules, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were in support of or in opposition to adoption of the rules, and the reasons why the Division agrees or disagrees with some of the comments and recommendations.

No request for public hearing was received. The public comment period closed August 31, 2009.

These amendments are necessary to implement statutory provisions of House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005; and HB 4545, enacted by the 81st Legislature, Regular Session, effective September 1, 2009. HB 7 amended Chapter 410, Subchapter E of the Labor Code by amending §§410.201, 410.203, and 410.204. HB 4545 amended Chapter 410, Subchapter E of the Labor Code by amending §410.252.

The legislature amended §§410.201, 410.203, and 410.204 after considering recommendations made by the Sunset Advisory Commission Staff Report on the Texas Workers' Compensation Commission, April 2004 (Report). The Report concluded that the majority of the Appeals Panel workload involved writing decisions that simply affirmed the hearing officers' decisions.

The amendments to §§410.201, 410.203 and 410.204 made three changes regarding the Appeals Panel. First, Labor Code §410.201 was amended to provide that appeals judges, in a three-member panel, shall conduct administrative appeals proceedings. Second, §410.203 was amended to only allow the Appeals Panel to issue decisions if the Appeals Panel is reversing or remanding a decision of a hearing officer. The amendment to §410.203 also required the Appeals Panel to maintain a manual of precedent-establishing decisions. Section 410.203 further notes that the Appeals Panel may not remand a case more than once. Third, under §410.204, the decision of the hearing officer becomes final after 45 days if the Appeals Panel has not reversed and rendered or reversed and remanded the decision of the hearing officer thus eliminating the redundancy of issuing written decisions affirming the hearing officer's decision.

The amendments to §410.252(a) provided that a party could seek judicial review of the administrative decision by filing suit within 45 days after the Division mailed the decision of the Appeals Panel to the party. The amendments further provided that the mailing date is considered to be the fifth day after the decision of the Appeals Panel was filed with the Division.

In response to written comments received from interested parties, the Division has changed some of the proposed language in the text of the rule as adopted. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The Division received comments questioning the statutory basis for, and objecting to use of the term "deemed" in §143.3 and §143.4, without an explanation of how that term should be applied. As stated in detail below in the responses to comments under §143.3 and §143.4, the Division has implied authority under Labor Code §§402.061, 402.00111, 402.00128, and 410.204 to use "deemed" for Division communications.

The text in proposed §143.3(a)(3) is restructured and adopted to clarify that the hearing officer's decision is deemed to have been received by the parties in accordance with §102.5 (relating to General Rules for Written Communications To and From the Commission) and §102.3 (relating to Computation of Time) of this title. The adopted text is more comprehensive rule language and is clearer than the proposed text. The adopted text conforms to Labor Code §410.202(a) and further provides direction to the Division so it knows and system participants understand when a request for review is due.

The Division has also added the words "or parties" to subsection (a)(4) of §143.3 as adopted because there may be more than one opposing party that must be served on the same day the request for review of the decision of the hearing officer by the Appeals Panel is filed with the Division.

Under subsection (d) of §143.3 as adopted, the words "for review by the appeals panel" are added after request in the first sentence for clarity. Likewise, the words "with the division" are added after the word "served" in the third sentence, for clarity.

The text in §143.4(a)(3) is restructured and adopted to clarify that the appellant's appeal is deemed received in accordance with §102.5 (relating to General Rules for Written Communications To and From the Commission), §102.4 (relating to General Rules for Non-Commission Communications) and §102.3 (relating to Computation of Time) of this title. The adopted text conforms to Labor Code §410.202(b), reminds system participants of applicable rules pertaining to deemed receipt, and provides additional guidance regarding non-agency communications.

The Division has also removed the word "appellant" and replaced it with the words "other party or parties" to subsection (a)(4) of §143.4 as adopted. The other party or parties are the proper participants to be served so they can respond to the appellant's request for review by the Appeals Panel.

The Division has reformatted subsection (c) of §143.4 regarding responding to a request for review by the Appeals Panel to track the parallel provisions of §143.3(d) to the extent possible based on the suggestion of a commenter. The text in §143.4(c) as adopted is changed to the format used in §143.3(d) as adopted. In the first sentence, the words "request for review by the appeals panel" are replaced with "response to the appellant's request with the division", the word "appealing" is replaced with "responding", and the words "hearing officer's decision" are replaced with "appellant's request". In the third sentence, the word "request" is replaced with "response" and the words "hearing officer's decision" are replaced with "appellant's request". However, §143.4(c) as adopted retains proposal language which removed "or timely served" because the Division has no method of knowing when the other party actually receives a response; further, the Division does not use the "other party" receipt date to calculate a timely response. As adopted, a response made under §143.4(c) shall be presumed timely filed if it meets the listed conditions under this section.

Proposed §143.4(d) has been deleted from the adopted text because its substance has been incorporated in §143.4(c) as adopted.

Section 143.2 clarifies the actions the Appeals Panel may take in reviewing the decision of a hearing officer. The section is adopted as proposed.

Section 143.3 delineates the process a party must follow to appeal a decision of a hearing officer. The section is adopted with changes.

Section 143.4 sets forth the process that the party responding to a request for review by the Appeals Panel must follow to respond to the request. The section is adopted with changes.

Section 143.5 sets forth the procedures for the Appeals Panel for issuing a decision on the appeal. The section is adopted as proposed.

Summaries of the comments and agency responses are as follows:

General Comment: Commenter suggests an online posting of the date the Appeals Panel reviewed the hearing officer's decision which may be accessed by the appealing party and a precedent manual of precedent-establishing decisions that is also publicly posted.

Agency Response: The Division acknowledges the suggestions. A specific date of review of the hearing officer's decision cannot be identified as the review process begins upon receipt of the appeal and continues until final processing. The Division maintains a precedent manual of precedent-establishing decisions, the Appeals Panel Decision Manual (APDM), which has been on a dedicated page of the Division website since its inception in 2005. Two versions of the APDM are maintained on the page, an HTML version and a searchable Word version. The HTML version is at http://www.tdi.state.tx.us/wc/idr/documents/apdmanual.html. The word version is at http://www.tdi.state.tx.us/wc/idr/documents/apdmword.doc. The Division maintains an index of redacted Appeals Panel Decision by year which can be found on a dedicated page of the Division website. The HTML version is at http://www.tdi.state.tx.us/wc/admindecisions.html#apd.

General Comment: Commenter states that a hearing officer's decision will become final after 45 days regardless of whether a notice is sent or not, and that the lack of a response implies that no revision or remand to a hearing officer's decision was made. Commenter states several unrepresented injured employees, in response to an appeal sent to the Appeals Panel, received a response of "not appealed timely." Inquiry was made to the Division regarding this response. Commenter states that the injured employees were informed that the response did not indicate an untimely appeal but rather that the hearing officer's decision became final. Commenter suggests that unrepresented injured employees should receive a plain language notice explaining why the appeal had no merits.

Agency Response: The Division disagrees. Commenter is essentially requesting that a decision be issued by the Appeals Panel affirming the hearing officer's decision. HB 7 mandated that the Appeals Panel will no longer issue decisions which affirm the decision of the hearing officer, and the suggestion disregards legislative intent by having the Appeals Panel explain why the decision is affirmable. Either a notice or a written decision is sent to the parties after review of an appeal. A written decision is issued and sent to the parties when the hearing officer's decision contains a reversible error. The Appeals Panel issues notices that the decision of the hearing officer became final when the decision by the hearing officer does not contain reversible error. The Appeals Panel also issues written notices for appeals that are untimely which explain why the appeal is not timely and therefore that the Appeals Panel does not have jurisdiction to address the merits of the appeal.

General Comment: Commenters opine that it is very important that Division hearing officers refrain from developing new public policy or interpretations of the law that are implemented for the first time at contested case hearing (CCH) proceedings. Since HB 7 has taken away the Appeals Panel's power to affirm, commenters think stakeholders will not be notified if a change of position or procedural issue is implemented for the first time at a CCH. Commenters suggest that the Division issue public bulletins announcing any changes in its interpretation and implementation of laws.

Agency Response: The Division recognizes the commenter's concerns. However, the issue raised is beyond the scope of the rules presently discussed. The issuance of public bulletins to explain why a hearing officer's decision is affirmable would disregard legislative intent by having the Appeals Panel explain why the decision is affirmable.

General Comment: Commenter believes that the extended timeframe for the Appeals Panel to issue decisions, having been extended from 30 to 45 days, will allow the Appeals Panel to publish consistent decisions.

Agency Response: The Division agrees.

General Comment: Commenter contends that contested case hearing and Appeals Panel decisions fail to meet the requirements of the Administrative Procedure Act and the Texas Constitution, and that Appeals Panel decisions fail to provide any findings of fact or conclusions of law that detail how the decision was reached.

Agency Response: The Division disagrees. The discussion of contested case hearing decisions is beyond the scope of this rulemaking. The Labor Code does not require Appeals Panel decisions to include findings of fact and conclusions of law.

General Comment: Commenter recommends allowing an appellant the opportunity to submit a reply brief which Texas civil litigation allows in every other aspect. Commenter submits a proposal for rule language and further states that it would not oppose a page limitation.

Agency Response: The Division disagrees. Section 410.202 only provides for a party who wants to dispute the decision of a hearing officer to do so by filing a written appeal and which allows the other party or parties to file a written response. The Labor Code makes no provision for replies to responses. There is currently no page limitation on either the appeal or the response.

General Comment: Commenter states that the proposed rules repeat statutory language frequently and that the statutory language should be removed.

Agency Response: The Division disagrees. There are many times in which the use of statutory language makes a rule more complete and easier to use and understand. That is true in these rules where the statutory language is repeated.

§143.3

Comment: Commenter states *Combined Specialty Insurance Company v. Deese,* 266 S.W.3d 653 (Tex. App.-Dallas 2008, no pet.) raised concerns that are not addressed by these rules. Specifically, commenter states the court in *Deese* notes the purpose of §143.3(e) is to: establish a clear date of receipt to act as a trigger for Appeals Panel action; to serve the parties' convenience by allowing the parties to file a document by mailing it within the same time period as the parties could file in person; and to maintain a firm outer deadline for receipt of documents by the Division. Commenter further states the court in *Deese* was concerned by the possibility of an appeal being found untimely due to issues with the postal service, and held that the piece of

paper which was mailed to the Division by the 15th day need not be the same piece of paper that was received by the Division on or before the 20th day but rather an appeal is considered timely if an identical copy is received by the 20th day.

Agency Response: The Division agrees that the *Deese* court held if a party timely mailed its request for review and the request or an identical copy is received by the Division within twenty days after the party received the hearing officer's decision, the appeal is considered timely because compliance with rule has been shown. However, no rule revision is necessary because the language of the rule does not contradict the holding in *Deese.*

Comment: Commenter requests that the rule or the preamble make clear that the presumption of timeliness can be rebutted and to provide how the parties can rebut that presumption.

Agency Response: The Division disagrees. It is incumbent on the parties to establish jurisdiction and the timeliness of the appeal at the time the appeal is filed.

Comment: Commenters recommend several changes to existing rules. The recommendations were as follows:

Define "clearly and concisely".

Specify consequences for failing to write clearly and concisely.

State the elements that must be included in an agency dispute resolution decision.

Define what constitutes "service on the other party on the same day".

Assure that the Appeals Panel actually reads the appeal.

Agency Response: The Division disagrees. The Appeals Panel reviews each request for review and response filed with the Division. The sufficiency of an appeal is determined on a case-by-case basis according to the facts presented. A written decision is issued by the Appeals Panel if reversible error is found in the hearing officer's decision which explains the error. No rule revision is necessary.

§143.3 and §143.4

Comment: Commenter points to a discrepancy between §143.3 and §143.4. Specifically, §143.3 states "timely filed or timely served" but §143.4 does not contain "timely served."

Agency Response: The Division disagrees that there is a discrepancy. The Division removed "or timely served" from §143.4(c) as part of the proposed rule change because the Division has no method of knowing when the other party actually receives a response. Further, the Division does not use the "other party" receipt date to calculate a timely response.

Comment: Commenter suggests that §143.4(c) parallel §143.3(d).

Agency Response: The Division agrees that §143.4(c) and 143.3(d) be changed to the extent possible to make them parallel and has made those changes.

Comment: Commenters object to the use of the word "deemed" when referring to the date of receipt of communications in §§143.3(a)(3), 143.4(a)(3) and §143.4(c)(1) - (2). Commenters assert that there is no statutory authority for using "deemed" and therefore "deemed" should be removed.

Agency Response: The Division disagrees. Labor Code §402.061 vests the Commissioner with the power and authority to promulgate rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act (Act). Section 402.00111 also provides the Commissioner rulemaking authority. Further, §402.00128 grants general powers to the Commissioner including prescribing the form, manner and procedure for the transmission of information to the Division. The Appeals Panel which reviews each appeal has the express duty conferred under §410.204 of the Act to issue a written decision not later than the 45th day after the date on which the written response to the request for the appeal is filed. Therefore, there must be a mechanism for the Division to start the 45-day deadline in the appeals process. A party has 15 days after deemed receipt of the hearing officer's decision as the adopted rule requires in §143.3(a)(3). If the Division had no means by which to deem receipt of the appeal pursuant to §102.5, and §102.3, the Division would never know when a request for review is due. The appeals process then progresses through the whole continuum from the request for review to a written response using deemed receipt when referring to the date of receipt of communications in §143.4(a) (3) and §143.4(c)(1) - (2) to the written decision and completing the end date of the 45-day deadline of the appeals process. *Trinity Universal Insurance Company v. Day,* 155 S.W.3d 337 (Tex.App.-El Paso 2004, pet. denied) held that the deemed date of receipt under §102.5(d) was applicable in determining the timeliness of an appeal.

Comment: Commenter further states that even if the Division had statutory authority for its deemed receipt provision, the Appeals Panel has no fact finding authority that would allow it to determine by the great weight of evidence if a party actually received the contested case decision under §143.3(a)(3) at another date.

Agency Response: The Division disagrees. The Appeals Panel, as with any other judicial body, must always determine its jurisdiction. Section 410.169 provides that in the absence of a timely appeal the decision of the hearing officer becomes final.

Comment: Commenter recommends a specific time limit in §143.3(b) and §143.4(b) for the Division to provide a copy of the request for review and of the response to the parties within "three business days" instead of "expeditiously" when it is not clear that the party or parties have been served.

Agency Response: The Division disagrees. It is inappropriate for the Division to adopt by rule its internal procedure or processes. It is the customary practice for the Division to distribute a copy of the request for review and the response to the parties on the next business day after the document was filed when it is not clear that the party or parties have been served.

§143.5

Comment: Commenter states that proposed §143.5(c) conflicts with Labor Code §410.204(a) and is therefore void.

Agency Response: The Division disagrees. Filing an Appeals Panel decision with the Division instead of the Commissioner is tantamount to filing with the Commissioner. This action is a permissible delegation of authority under the Act pursuant to §402.00128.

For, without changes: None.

For, with changes: Insurance Council of Texas, Office of Injured Employee Counsel, Work Injury Assistance Center of Texas, John D. Pringle, Property and Casualty Insurers Association of America, Texas Mutual Insurance Company

Against: Flahive, Ogden & Latson.

The amendments are adopted under the Labor Code §§402.00111, 402.00128, 402.061, 410.201, 410.202, 410.203, 410.204, and 410.252(a). Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate and issue subpoenas. Section 402.061 authorizes the Commissioner to adopt rules as necessary for the implementation and enforcement of the Act. Section 410.201 provides that appeals judges, in a three-member panel, shall conduct administrative proceedings. Section 410.202 explains the mechanics of the request for appeal of the decision of a hearing officer, the time frames and the computation of time for both the party that appeals and the party that responds. Section 410.203 specifies that the appeals panel may reverse the decision of the hearing officer and render a new decision or reverse and remand for further consideration and development of evidence, with no more than one remand. Section 410.204 provides that the appeals panel must review each request and issue a written decision on each reversed or remanded case which must be issued not later than the 45th day after the date on which the written response to the request for the appeal is filed with the Division. Section 410.252(a) authorizes a party to seek judicial review by filing suit not later than the 45th day after the date on which the Division mailed the party the decision of the appeals panel. For purposes of this section, the mailing date is considered to be the fifth day after the date the decision of the appeals panel was filed with the Division.

§143.3. Requesting the Appeals Panel to Review the Decision of the Hearing Officer.

(a) A party to a benefit contested case hearing who is dissatisfied with the decision of the hearing officer may request the appeals panel to review that decision. The request shall:

(1) be in writing;

(2) clearly and concisely rebut each issue in the hearing officer's decision that the appellant wants reviewed, and state the relief the appellant wants granted;

(3) be filed with the Chief Clerk of Proceedings in the division's central office in Austin not later than the 15th day after receipt of the hearing officer's decision. The hearing officer's decision is deemed to have been received by the parties in accordance with §102.5 (relating to General Rules for Written Communications To and From the Commission) and §102.3 (relating to Computation of Time) of this title. Requests that are timely submitted to a division location other than the Chief Clerk of Proceedings, such as a local field office of the division, will be considered timely filed and forwarded to the division's appeals panel for consideration, but this may result in delay in the processing of the request. Untimely requests, regardless of whether they are filed with the Chief Clerk of Proceedings in the division's central office or in a different division field office, do not invoke the jurisdiction of the appeals panel and will not be reviewed by the appeals panel;

(4) be served on the other party or parties on the same day filed with the division; and

(5) contain a statement certifying that a copy has been served on the other party or parties in person, mailed by certified mail, return receipt requested, or transmitted by verifiable means. A certificate in substantially the following form shall be used: "I hereby certify that I have on this ____ day of _____, _____, served a copy of the attached request for appeal on _____ (state the name of the other party or parties on whom a copy was served) by _____ (state the manner of service)." _____ Signature

(b) If it is not clear from the request for review that the party has properly served a copy of the request on the other party or parties, the division will provide a copy of the request expeditiously.

(c) A party may make a conditional request for review by the appeals panel even if the overall contested case hearing decision is favorable. A timely request that indicates that the filing party seeks consideration only if the opposing party files a request for review will not be treated as a request for review unless an opposing party timely files a request. If an opposing party does file a timely request, the conditional request will be treated as a cross-appeal.

(d) A request for review by the appeals panel shall be filed not later than the 15th day after the appealing party is deemed to have received the hearing officer's decision. Saturdays and Sundays and holidays listed in §662.003, Government Code, are not included in the computation of this 15-day period. A request made under this section shall be presumed to be timely filed or timely served with the division if it is:

(1) mailed on or before the 15th day after the date of deemed receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2) received by the division not later than the 20th day after the date of deemed receipt of the hearing officer's decision.

§143.4. Responding to a Request for Review by the Appeals Panel.

(a) The other party shall respond to the appellant's request. The response shall:

(1) be in writing;

(2) clearly and concisely support each issue in the hearing officer's decision that the appellant has rebutted in the request, and state why the appellant's relief should not be granted;

(3) be filed with the Chief Clerk of Proceedings in the division's central office in Austin not later than the 15th day after receipt of the appellant's appeal. The appellant's appeal is deemed received in accordance with §102.5 (relating to General Rules for Written Communications To and From the Commission, §102.4 (relating to General Rules for Non-Commission Communications) and §102.3 (relating to Computation of Time) of this title. Responses that are timely submitted to a division location other than the Chief Clerk of Proceedings, such as a local field office of the division, will be considered filed timely and forwarded to the division's appeals panel for consideration, but this may result in delay in the processing of the response. Untimely responses, regardless of whether they are filed with the Chief Clerk of Proceedings or in a different division office, will not be reviewed by the appeals panel;

(4) be served on the other party or parties on the same day filed with the division; and

(5) contain a statement certifying that a copy has been served on the other party or parties in person, mailed by certified mail, return receipt requested, or transmitted by verifiable means. A certificate in substantially the following form shall be used: "I hereby certify that I have on this ____ day of _____, _____, served a copy of the attached response to a request for appeal on _____ (state the name of the other party or parties on whom a copy was served) by _____ (state the manner of service)." _____ Signature

(b) If it is not clear from the response that the party has properly served a copy of the response on the other party or parties, the division shall provide a copy of the response expeditiously.

(c) A response to the appellant's request with the division shall be filed not later than the 15th day after the responding party is deemed to have received the appellant's request. Saturdays and Sundays and holidays listed in §662.003, Government Code, are not included in the computation of this 15-day period. A response made under this section shall be presumed to be timely filed with the division if it is:

(1) mailed on or before the 15th day after the date of deemed receipt of the appellant's request, as provided in subsection (a) of this section; and

(2) received by the division not later than the 20th day after the date of deemed receipt of the appellant's request.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905403
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: December 13, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 804-4703

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 290. PUBLIC DRINKING WATER
SUBCHAPTER D. RULES AND REGULATIONS FOR PUBLIC WATER SYSTEMS

30 TAC §§290.38, 290.39, 290.44 - 290.47

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§290.38, 290.39, and 290.44 - 290.47.

Sections 290.38, 290.39, 290.45, and 290.47 are adopted *with changes* to the proposed text as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5871). Section 290.44 and §290.46 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2009, the 81st Legislature passed Senate Bill (SB) 361, relating to the requirement that certain water service providers ensure emergency operations during an extended power outage. SB 361 amends Texas Water Code (TWC), Chapter 13, by adding §13.1395, Standards of Emergency Operation, and §13.1396, Coordination of Emergency Operations. TWC, §13.1395, requires that affected utilities prepare an emergency preparedness plan (EPP) that shows that the utility has the ability to provide emergency operations and submit that plan to the commission. TWC, §13.1396, outlines the coordination efforts among an affected utility, its county judge, and its office of emergency management as well as each retail electric provider that sells electric power to an affected utility and each electric utility that provides transmission and distribution service to an affected utility.

TWC, §13.1395, provides that a water service provider may use the commission's template to develop its EPP and must include one of eight means for maintaining 35 pounds per square inch (psi) of pressure during power outages that last longer than 24 hours as soon as it is safe and practicable following natural disasters. The statute also specifies that the commission has 90 days once the plan is submitted to review the plan and either approve it or recommend changes. Once the commission approves the plan the water service provider must operate in accordance with its plan and maintain any generators in accordance with manufacturer's specifications. TWC, §13.1395, also specifies that the commission will conduct inspections to ensure compliance and that waivers to these requirements are available under certain circumstances. Additionally, these additions to the TWC made by SB 361 give the commission the authority to regulate water service providers that have not previously been regulated by the TCEQ.

SB 361, Section 2(c), requires that each affected utility submit to the commission its EPP required by TWC, §13.1395, no later than March 1, 2010.

In its proposal the commission solicited comments on the appropriate sources and year of population data to determine the counties to which this rule applies. Further, the commission solicited comments on which counties adjacent to Harris County would be subject to this adopted rule. As discussed in the RESPONSE TO COMMENT section of this preamble, the commission received comments on the appropriate sources and year of data population as well as which counties adjacent to Harris County would be subject to this rulemaking from Lloyd Gosselink on behalf of San Jacinto River Authority (SJRA) and Schwartz, Page & Harding, L.L.P., (SPH) on behalf of its clients.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts amendments to 30 TAC Chapter 291, Utility Regulations.

SECTION BY SECTION DISCUSSION

§290.38, Definitions

The commission adopts a definition for "affected utility" in §290.38(1) using the language of TWC, §13.1395(a)(1). The commission adopts a definition for "emergency operations" in §290.38(26) using the language of TWC, §13.1395(a)(2). The commission adopts a definition for "extended power outage" in §290.38(28) using the language of TWC, §13.1395(a)(3). The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361. In response to comment, the commission amended §290.38(1) to incorporate by reference the Chapter 291 definitions not found elsewhere in Chapter 290, which is a change to the proposed text. All existing definitions in this section are renumbered to accommodate the adopted new definitions.

§290.39, General Provisions

The commission adopts §290.39(a) to include a statement that the authority for this subchapter comes from TWC, §13.1395. The commission adds §290.39(c)(4)(A) - (D) for new affected

utilities and §290.39(o)(1) - (5) for existing affected utilities, to require affected utilities to adopt and submit an EPP as required by TWC, §13.1395(a)(2). These include requirements that the executive director review the plan and either approve it or make recommendations to the plan within 90 days to implement TWC, §13.1395(c), that affected utilities who provide surface water to wholesale customers install and maintain automatically starting auxiliary generators or distributive generation facilities for each facility necessary to provide water to its wholesale customers to implement TWC, §13.1395(c), that affected utilities provide a deadline for implementation of the plan as described in TWC, §13.1395(c), and provide for a mechanism to request an extension to the deadline to implement or submit the plan as allowed in SB 361, Section 2(e). The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361 and to implement SB 361, Section 2(e). Additionally, the commission adds §290.39(c)(4)(E) for new affected utilities and §290.39(o)(6) for existing affected utilities to allow them to request a waiver to the EPP requirements if they can demonstrate that compliance with those requirements will cause a significant financial burden on their customers. The affected utility shall submit financial, managerial, and technical information as requested by the executive director to demonstrate their financial burden. These additions are to implement TWC, §13.1395(j), as added by SB 361. In response to comment, the commission added language to §290.39(c)(4)(A) and (o)(1) to clarify when EPPs are required to be submitted under the direction of a licensed professional engineer, which is a change to the proposed text.

§290.44, Water Distribution

The commission adopts §290.44(d) to specify that the distribution system of affected utilities must be designed to provide for emergency operations to implement TWC, §13.1395(b)(1). The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

§290.45, Minimum Water System Capacity Requirements

The commission adopts §290.45(a)(7), which requires affected utilities that cannot maintain emergency operations to revise and submit their EPP within 180 days of restoration of power, and that based on a review of the plan, the executive director may require additional or alternative auxiliary emergency facilities to implement TWC, §13.1395(b)(1). In response to comment, the commission revised the proposed text for §290.45(a)(7) to include the option of providing justification regarding pressure drop. For affected utilities to reference the emergency operations requirements rules in §290.45(h), the commission adds §290.45(b)(3) for community water systems; §290.45(c)(3) and (d)(4) for non-community water systems; and §290.45(e)(4) for wholesalers. Section 290.45(b)(3) also specifies that these requirements do apply to affected utilities that provide 100 gallons of elevated storage capacity per connection. The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

The commission adopts §290.45(g)(5)(A)(iv) to specify that a public water system that is an affected utility and requests an alternative capacity requirement for pressure maintenance facilities must conduct the modeling requirements using the minimum capacities, pressures, and auxiliary power requirements specified in renumbered §290.45(h)(1). The commission adopts §290.45(g)(5)(B)(i) to further clarify that the affected utility's generators must only be maintained, tested, and operated in accordance with manufacturer's specifications to implement TWC, §13.1395(h). The commission adopts §290.45(g)(5)(B) to specify that affected utilities that are public water systems must comply with the requirements in §290.45(h). The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

The commission adopts §290.45(h) to establish affected utilities' emergency power requirements. It specifies that these new requirements are in addition to the existing emergency power requirements for public water systems located in this section. In response to comments, the commission removed its proposal of §290.45(h)(1)(A) - (D) and (2)(A) - (D) because upon further consideration the commission decided that the flow rate for maintaining 35 psi would be better defined in its shell form, TCEQ Form Number 20536; the commission renumbered the subsequent paragraphs accordingly; and the commission also revised references to these renumbered paragraphs in §290.39(c)(4)(C) and (o)(3). The commission adopts §290.45(h)(1)(A) - (H), which now provides eight auxiliary power options as listed in TWC, §13.1395(c)(1) - (8) for including in the EPP. It also clarifies that the auxiliary power must meet the capacity requirements for affected utilities during emergency operations. The commission adopts §290.45(h)(2), which requires that affected utilities who provide surface water to wholesale customers install and maintain automatically starting auxiliary generators or distributive generation facilities for each facility necessary to provide water to its wholesale customers to implement TWC, §13.1395(c). The commission adopts §290.45(h)(3), which requires that auxiliary power facilities for affected utilities be maintained, tested, and operated in accordance with the manufacturer's specifications to implement TWC, §13.1395(h). The commission adopts §290.45(h)(4), which allows an affected utility to adopt and encourages them to enforce limitations on water use while the utility is providing emergency operations to implement TWC, §13.1395(k). The commission adopts §290.45(h)(5), which clarifies that affected utilities with elevated storage must operate in accordance with their approved EPP during emergency operations, which may or may not include using elevated storage, to implement TWC, §13.1395(e). In response to comment the commission amended §290.45(h)(5) to make the EPP an alternative to elevated storage requirements, provided the affected utility can meet the pressure and flow requirements of Chapter 290, Subchapter D, under normal operating conditions, which is a change to the proposed text. The commission adopts §290.45(h)(6), which requires an affected utility to maintain on-site, or make readily available during emergency operations, an amount of fuel necessary to operate any required emergency power equipment under load for a period of at least 72 hours. In response to comment, the commission amended the proposed text of the renumbered §290.45(h)(6) by replacing "under load" with the phrase "necessary to maintain emergency operations." Further, in response to comment, the commission amended the proposed text of the renumbered §290.45(h)(6) to remove the minimum requirement of 72 hours of fuel storage. The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

§290.46, Minimum Acceptable Operating Practices for Public Drinking Water Systems

The commission adopts §290.46(f)(5), which requires affected utilities to maintain records. Adopted §290.46(f)(5)(A) requires that they maintain copies of an EPP approved by the executive director and a copy of the approval letter. Adopted §290.46(f)(5)(B) requires that they maintain copies of operating

and maintenance records for auxiliary power equipment, and adopted §290.46(f)(5)(C) requires that they maintain a copy of the manufacturer's specifications for all generators that are part of the approved EPP. These records requirements are to aid in the implementation of TWC, §13.1395(i), which requires that the commission periodically inspect affected utilities to ensure compliance with their approved EPPs. The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

The commission adopts §290.46(r) to clarify that affected utilities must maintain a minimum of 35 psi throughout the distribution system as soon as safe and practicable during an extended power outage following a natural disaster to implement TWC, §13.1395(b)(1). The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

§290.47, Appendices

The commission adopts §290.47(j), concerning Emergency Preparedness Plan Template, to implement TWC, §13.1395(g). The new template lists the eight options that affected water systems may choose as listed in TWC, §13.1395(c)(1) - (8), and the preparations an affected utility may make, as well as applicable rules for emergency operations of affected utilities as required by TWC, §13.1395(g)(1) and (2). In response to comment, the commission amended §290.47(j) to: update the references to citations amended elsewhere in this rulemaking; revise the language in Plan Option 3 to clarify that the intent of SB 361 will be met by all parties in a mutual aid agreement when due consideration is given to where other water suppliers are located in the event that they are also affected by the same natural disaster; replace references to "full load" with "the load necessary to maintain emergency operations;" add a requirement that the affected utility provide documentation as to how it will ensure that it maintains an adequate supply of fuel during emergency operations; add a requirement that the affected utility provide information as to how the affected utility determined the necessary fuel quantity; and incorporate the requirement for affected utilities to state in their EPP their proposed full implementation schedule. Additionally, the commission corrected references in §290.47(j), Emergency Preparedness Plan Template, to "example" and "CCN" to refer to terms generally in use by the commission; and, also included the commission's designated form number. The commission adopts these amendments to implement TWC, §13.1395, as added by SB 361.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rule is to require certain water utilities, providers, and conveyors, to have EPPs for maintaining water pressure following a disruption in service caused by a natural disaster. These rules are not required by federal regulations.

The adopted amendments to Chapter 290 sets out to clarify who the affected utilities are and how they may comply with the requirements. The adopted amendments require water utilities, providers, and conveyors of potable or raw water to submit for commission approval EPPs demonstrating how they can maintain 35 psi following a natural disaster that causes an extended power outage, while providing for waivers for those who can show that the requirement would result in a significant financial burden to its customers.

Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted amendments would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the adopted amendments will be significant with respect to the economy as a whole; therefore, the adopted amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for treatment of water used in public water systems and is specifically required by state law; 2) does not exceed the requirements of state law under TWC, Chapter 13, Subchapter E; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on treatment of water used in public water systems, but rather is adopted to be consistent with state law in order to ensure that emergency operations of water systems are commenced as soon as safe and practicable following the occurrence of a natural disaster; and 4) is not adopted solely under the general powers of the agency, but rather specifically under TWC, §13.041, which allows the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to implement certain recently enacted legislation relating to the emergency preparedness of af-

fected utilities. The adopted rules require an "affected utility" that is located within a county with a population of 3.3 million or more, or a county with a population of 400,000 or more that is adjacent to a county with a population of 3.3 million or more, to comply with emergency operations (SB 361). This rulemaking substantially advances this stated purpose by making the commission's rules consistent with the new statutory language. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this action does not affect private real property.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict the owner's right to property. More specifically, these rules implement legislation addressing the adoption of EPPs by "affected utilities" (SB 361). These provisions do not impose any burdens or restrictions on private real property. Therefore, the adopted amendments do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The specific intent of the adopted rules is to amend the rules to be consistent with recent legislative enactments (SB 361) to address the submission and review of EPPs by affected utilities, which is a procedural mechanism and is administrative in nature. Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held two public hearings for this rule on September 21, 2009 and September 22, 2009 in Harris County, Texas. The comment period closed September 28, 2009.

At the public hearings the commission received oral comments from Representative Bill Callegari; Bacon and Wallace, L.L.P., on behalf of its clients (Bacon & Wallace); the City of Baytown (Baytown); the City of Houston (Houston); Costello Engineers (Costello); Jacobs Engineering (Jacobs Engineering); Roy Moffitt Customized Fuel (Roy Moffitt); and Patrick F. Timmons, Jr., attorney at law, on behalf of HMW Special Utility District (HMW).

The commission received written comments from Allen Boone Humphries Robinson, L.L.P. (ABHR); Baytown; the City of Richmond (Richmond); the City of Sugar Land (Sugar Land); Dow Chemical Company (Dow); Houston; HMW; Jones and Carter (J&C); North Harris County Regional Water Authority (NHCRWA); Pate Engineers, Inc. (Pate); Roy Patricia Investments (RPI); SJRA; Southwest Water Company (Southwest); and SPH.

Richmond did not support the rulemaking. All other commenters generally supported the rulemaking; however, some commenters provided suggested language as discussed in the RESPONSE TO COMMENTS section.

RESPONSE TO COMMENTS

During his oral comments, Representative Callegari stated that the intent of the bill was to include Harris and Fort Bend Counties, and not to affect Montgomery County. He stated that the legislative process did not allow representatives to name particular counties that a bill affects; therefore, the bill was drafted to include these two counties based on population brackets. The legislative counsel's data showed that the population for Montgomery County was less than 400,000 at the time the bill was drafted. The bill was not intended to apply to Montgomery County, even if the population exceeded the threshold in the future. He stated this would be corrected in future legislation. Jacobs Engineering asked why the bill only affected Fort Bend and Harris Counties. SJRA and SPH commented that the proposed rules' population figures should be based on the most recent federal decennial census, which is the Year 2000 Census. SJRA and SPH further noted that the Code Construction Act defines "population" to mean "the population shown by the most recent federal decennial census" (see Texas Government Code, §311.005(3)). SJRA requested that the commission clarify that the term "population" is to be interpreted in accordance with the Code Construction Act. Finally, SJRA noted that SB 361 applies to Harris County, but not to any other county, because, pursuant to the Year 2000 Census, no other county adjacent to Harris County had a population of "400,000 or more." SPH recommended that the commission remove Fort Bend County from its proposed rules until such time as that county officially crosses the population threshold contained in SB 361.

The commission agrees with SJRA and SPH's comment regarding the use of the term "population" as it applies to SB 361 because the legislation did not specifically require a different definition of "population." Therefore, absent express statutory language, the commission must follow the definition contained in the Code Construction Act. Based on the Year 2000 Census this rule applies only to Harris County and not to any other county, as no county adjacent to Harris County had a population of at least 400,000 in the Year 2000 Census. In response to comment, the commission added a definition for the term "population" in §291.161. It is the intent of the commission that this definition only apply to the implementation of TWC, §13.1395 and not apply to "population" as that word is used elsewhere in Chapters 290 and 291, other than Chapter 291, Subchapter L, Standards of Emergency Operations.

HMW requested clarification on whether the commission will have a mechanism to notify affected utilities in Montgomery County of when they become subject to these regulations.

The commission responds that counties can identify themselves as being subject to this rule by consulting the most recent federal decennial census data. No changes were made in response to this comment.

HMW submitted a written comment on what mechanism the TCEQ will use to determine the future dates on which Montgomery County, and all other counties adjacent to Harris County, will become subject to the new statute's implementing rules. ABHR commented that the rule should be revised to clarify that water systems that become affected utilities after December 1, 2009 have a review time of 90 calendar days following the submission of its EPP.

As future decennial data become available, systems in adjacent counties will automatically fall under the requirements of these rules and there will be a 90-day review period following submission of an EPP to the commission. Section 291.162(k) requires affected utilities established after the effective date of this rule to have EPPs approved and implemented prior to beginning construction; further, §291.162(b) includes a 90-day review time frame for water providers that become affected utilities after December 1, 2009. Existing water providers that become affected utilities due to population changes are not addressed within SB 361. At such time that the legislature clarifies future applicability parameters, the commission will respond accordingly. The commission made no change in response to this comment as Chapters 290 and 291 already include a 90-day review time frame for water providers that become affected utilities after December 1, 2009.

Representative Callegari stated that the intent of SB 361 was that water systems in other counties that provide water to Harris County were affected utilities. Baytown wanted to know whether its Chambers County station, which provides water to Harris County, was subject to SB 361. Baytown further commented that the proposed rules did not appear to apply to raw water sources outside of Harris and Fort Bend Counties. Baytown commented that without this supply, the requirement of emergency power within those counties was essentially useless, because systems within Harris and Fort Bend Counties would have no water to treat. J&C requested clarification on whether a water provider located outside the applicable counties and providing service to those counties is considered an affected utility. ABHR commented that it supported Representative Callegari's position that SB 361 applies to water providers outside of Harris County providing water service to customers within those counties. ABHR requested the commission's clarification that the rules would apply only to such a system's facilities serving customers in Harris and Fort Bend Counties, but not to its entire system.

The commission responds that the rule only applies within counties that meet the population brackets set out in the statute and as defined by the Code Construction Act, Texas Government Code, §311.005(3). Based on the Year 2000 Census this rule applies only to Harris County and not to any other county, as no county adjacent to Harris County had a population of at least 400,000 in the Year 2000 Census. The commission's rule is intended to only apply to affected utilities whose facilities and more than one customer are located within the bracketed counties. The adopted rules require water service providers that meet the definition of an affected utility to submit an EPP to the commission. Water service providers that are located in counties that do not fall within the population brackets are not required to submit EPPs under the provisions of SB 361. The commission made no changes in response to this comment.

Dow commented that the definition of affected utility is ambiguous and should be clarified. Dow further commented that the definition of retail public utility and customer are defined in §291.1, but these and other terms are not referenced in the definition of affected utility found in §290.38. Dow recommended that the definition exempt noncommunity water systems from the amendments, as there is no impact to the community.

The commission responds that the definition of affected utility was taken from the language contained in SB 361. SB 361 affects noncommunity systems, and therefore, the commission does not have the authority to exempt those systems from this bill's requirements. In addition, the commission does not have the authority to revise the statutory language. However, one of the eight options in the EPP allows an affected utility to use any other alternative that is determined by the commission to be acceptable. In response to this comment, the commission amended §290.38(1) to incorporate by reference the Chapter 291 definitions not found elsewhere in Chapter 290 and renumbered the subsequent paragraphs accordingly.

SJRA requested clarification on whether the rule applies to wholesale raw water providers. Further, SJRA commented that the fiscal note did not discuss the financial impact of this rule on wholesale raw water providers. SJRA commented that the proposed rules should be defined to apply only to public water systems as defined in Subchapter D to include only those systems providing potable water services and the proposed rules under Chapter 291 should be interpreted to apply only to water utilities as defined in Chapter 291 to include only utilities providing potable water.

The commission responds that the language contained in SB 361, which amended TWC, §13.1395(a)(1) to define an affected utility as "a retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water to more than one customer," included raw water service in its definition. The intent of SB 361 was to regulate, among others, wholesale raw water providers to ensure that retail public utilities have sufficient water supplies during a natural disaster to ensure service is provided during emergency operations. The commission concurs that it did not specifically address impacts to wholesale raw water providers in its fiscal note. According to the water utilities database (WUD) (the commission's database of record for utilities, districts, and public water systems), no wholesale raw water providers were identified in Harris County. However, the commission has since conducted a fiscal analysis of the rule's impact to wholesale raw water providers and the amended fiscal note provided, in part as follows: "The proposed rules are not expected to have a significant fiscal impact on governmental entities that own or operate public water systems, but governmental entities that are raw water wholesalers could see costs increase significantly as a result of the proposed rules . . . The proposed rules will require local governments in Harris County that wholesale raw water to more than one customer to prepare an EPP ensuring operation of their water systems at 35 psi during an extended power outage by one of the following options: automatically starting auxiliary generators or on-site electrical generation . . . If . . . governmental entities are able to enter into a mutual aid agreement, they should not experience any significant cost increases as a result of the proposed rules . . . If these raw water wholesalers purchase generators to comply with EPP provisions, each of their pump stations will need to be evaluated separately to determine specific generator requirements. Staff estimates that the purchase and installation of emergency generators will cost these governmental entities approximately $25,000 per million gallons per day (MGD) of raw water delivered. The average daily production of these governmental entities may be as much as 500 MGD from a single pump station, with a maximum pumping capacity of one billion gallons per day. At 500 MGD, raw water wholesalers could spend at a minimum $12.5 million to purchase and install generators, which would have a significant fiscal impact on their operations . . . Consumers of public water utilities or raw water could see rates increase, which may be significant if raw water wholesalers have to recoup their generator costs. In return, consumers are expected to experience more rapid deployment of water services in emergency situations . . . In general no significant fiscal im-

pacts are anticipated for businesses or individuals as a result of the proposed rules unless they purchase water from an affected raw water wholesaler. Those that purchase water from a raw water wholesaler that must install emergency generators could see a significant increase in costs." No change was made in response to this comment.

SJRA commented that failure to include a fiscal note on wholesale raw water providers is a violation of the Administrative Procedure Act (see Texas Government Code, §2001.024(4)).

The commission respectfully disagrees that it has violated the Administrative Procedure Act, Texas Government Code, §2001.024(4), by not addressing wholesale raw water providers. The commission did address the additional estimated cost to state and local governments as a result of administering this rule. Although the estimate may not have included every possible local entity, it nevertheless did address state and local impacts. Moreover, the commission's water utilities database lists no wholesale raw water providers in Harris County. Accordingly, the commission did not have data to analyze whether these local entities may have been impacted. No change was made in response to this comment.

SJRA commented that wholesale raw water service providers should not be required to maintain a minimum of 35 psi throughout their systems during emergency or normal operations and requests the commission's clarification on this issue.

The commission disagrees that the 35 psi requirement does not apply to raw water providers, as the definition of "emergency operations" includes the requirement to maintain 35 psi. An affected utility is required to submit an EPP that demonstrates its ability to provide emergency operations (TWC, §13.1395(b)(2)). "Emergency operations" is defined to include the operation of a water system during an extended power outage at a minimum water pressure of 35 psi (TWC, §13.1395(a)(2)). Accordingly, all affected utilities are required to maintain 35 psi. However, SB 361 also provides for waivers to systems for which the implementation would be a significant financial burden on its customers. No change has been made in response to this comment.

SJRA commented that the March 1, 2010 deadline, set out in §290.39(o)(1) for submitting EPPs, is only applicable to public water systems, and suggests giving a raw water provider a 12-month deadline from rule adoption to submit such plans to the TCEQ.

The commission agrees that the March 1, 2010 deadline in §290.39(o)(1) specifically applies only to public water systems. However, Chapter 291 requires affected utilities that exist as of December 1, 2009, to submit an EPP to the executive director no later than March 1, 2010 (§291.162(j)). These deadlines are consistent with SB 361, which provides that each affected utility shall submit its EPP to the TCEQ no later than March 1, 2010. An affected utility may also request an extension to this deadline, not to exceed 90 days. No changes were made in response to this comment.

SJRA requests clarification that the proposed rules under Chapters 290 and 291 do not apply to the wholesale provision of raw water for industrial purposes.

The commission agrees that the proposed rules do not apply to the wholesale provision of raw water for industrial purposes. No changes were made in response to this comment.

SJRA commented that the fiscal note included in the notice package significantly underestimates the financial burden on many affected utilities by concluding that "the cost increases are not expected to be significant." SJRA noted that even if an affected utility obtains backup generators through a mutual aid agreement, regulated entities will need to spend significant financial resources in evaluating and planning for such needs, addressing transactional costs in developing necessary agreements, and implementing the developed EPP.

The commission responds that existing §290.45 requires all public water systems with at least 250 connections that do not meet elevated storage requirements to have emergency power in place. Therefore, the commission focused its analysis of financial impact on affected utilities having less than 250 connections. The commission only considered the cost of the generator and its maintenance costs and did not consider transactional and design costs. No change was made in response to this comment.

HMW and J&C commented that average daily demand (ADD) was not defined by the regulation. ABHR provided suggested language defining ADD. J&C suggested a new definition for Average Daily Emergency Demand (ADED).

The commission agrees that the ADD is not clearly defined. The commission previously defined ADD by reference to American Water Works Association's (AWWA) 2000 Drinking Water Dictionary. SB 361 did not contain a reference to ADD. In response to these comments, the commission agrees to define ADD in its shell form, TCEQ Form Number 20536, using the AWWA's 2000 Drinking Water Dictionary definition as this term was not presented during the proposal phase. No changes have been made in response to these comments.

J&C recommended revisions to the definition of "auxiliary power" and suggested a new definition for "re-pumping system."

The commission responds that the proposed additional language to the definition of "auxiliary power" is unnecessary because SB 361 requires an affected utility to maintain operation of the water system at a minimum water pressure of 35 psi; therefore, a wholesaler's responsibility will end at the point of delivery to the purchasing water system. The commission declines to revise its definition of "auxiliary power" as SB 361 does not support this change. The commission further declines to add a new definition for "re-pumping system" as this definition is outside the scope of this rulemaking. Finally, because this term was not presented at the proposal phase, public comment was not sought on this proposed revision. No change was made in response to this comment.

J&C recommended revisions to proposed §290.39(c)(4)(B) and (o)(2), and §290.45(h)(4) (renumbered to §290.45(h)(2)) to include groundwater and to remove references to wholesale customers, and instead to include all customers, both wholesale and retail.

The commission declines to revise these sections as SB 361 does not support broadening the applicability to groundwater or including all customers. No change was made in response to this comment.

J&C proposed amending §290.45(a)(7) to allow an affected utility the option of maintaining 35 psi or the minimum pressure needed to supply a re-pumping station during a natural disaster. J&C further suggests that an affected utility be allowed to provide a justification regarding the pressure drop in lieu of the revised EPP.

The commission declines to revise §290.45(a)(7) as SB 361 requires affected utilities to maintain 35 psi during a natural disaster and as the commission is not empowered to revise TWC, §13.1395. The commission concurs with the commenter's second suggestion and, in response to this comment, amended §290.45(a)(7) to include the option of providing justification regarding pressure drop.

HMW and Houston commented that a flow rate of "the greater of the average daily demand or 0.35 gallons per minute per connection" was not required by the statute. Houston commented that 0.35 gallons per minute per connection was not a valid number for large systems, whose maximum demand may be lower than that. Also, water systems that implement water use restrictions during power outages should not be required to maintain 0.35 gallons per minute per connection. J&C recommended changes to water production requirements for community and noncommunity systems to include the use of ADD, based on winter month demands, and suggested revisions to §290.45(h)(1)(A) - (D), including addressing a typographical error by revising "plan" to "plane" in §290.45(h)(1)(D), and recommended the removal of §290.45(h)(2)(A) - (D). HMW noted that it would be difficult to determine what the ADD is, given that summer water demands would be greater than winter demands, and other issues also may affect ADD. ABHR commented that the ADD requirement should apply to community and noncommunity systems.

The commission responds that it concurs with the comments that a flow rate was not required by the statute. In response to these comments, the commission removed the flow requirements from Chapters 290 and 291 because upon further consideration the commission decided that the flow rate for maintaining 35 psi would be better defined in its shell form, TCEQ Form Number 20536. The commission also renumbered the subsequent paragraphs accordingly.

J&C suggested revising proposed §290.45(h)(3) to change the maintenance requirements for generators and right angle drives, to change "auxiliary generator" to "auxiliary power," and to clarify content of leasing and contracting agreements. J&C further suggested revising proposed §290.45(h)(5) to change "generators" to "auxiliary power facilities."

The commission responds that the language in renumbered §290.45(h)(1)(A), (B), and (G) was taken directly from SB 361 and therefore the commission declines to make the suggested revisions. Further, the commission clarifies that mutual aid agreements may include multiple affected utilities' combination of resources, including but not limited to water plant facilities, generators, and fuel, providing that the affected utilities meet the requirements in §290.45(h). Additionally, the commission clarifies that 30 TAC Chapter 117, Subchapter D, Combustion Control at Minor Sources in Ozone Nonattainment Areas, Division 1, Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources, as amended, would also apply. No changes have been made in response to these comments.

HMW, Baytown, ABHR, and Houston requested clarification on when the EPP should be fully implemented and whether "implement" means that an affected utility must only have an EPP approved, or fully implement the plan. They noted that the time needed to complete the plan may be affected by supply of generators, designing, funding, and constructing an emergency power system. Additionally, ABHR commented that the rule should be clear that the implementation period cannot be arbitrarily postponed by setting unnecessarily long timelines for design, installation, construction and/or financing of facilities. Further, Houston commented that the TCEQ's draft rules incorrectly interpreted the definition of implementation, and suggested that this should mean that an affected utility should begin to seek funding and commence the design by the implementation deadline of July 1, 2010, and complete the installation and construction without unreasonable delay. Baytown requested that its plan be allowed to include timelines and benchmarks to design, fund, and construct the components of its backup water supply system. HMW generally supported Baytown and added that water systems should be allowed a reasonable amount of time to implement their EPP. Jacobs Engineering noted that implementation will take longer than March 1, 2010 - July 1, 2010 to have construction complete. Some generators take 13 weeks from the order date until delivery. Jacobs Engineering further remarked that the implementation also included designing the civil and electrical modifications to the water plants. Representative Callegari acknowledged that July 1, 2010, was too soon for complete implementation. Representative Callegari commented that the July 1, 2010 date was not intended to be so binding or demanding as to create a financial hardship on affected utilities. Further, Representative Callegari stated that SB 361 intended for the EPP to be turned in by the implementation date; that the bill was intended to provide guidelines.

The commission agrees that, for the purposes of this rule, "implement" means initiating actions required to comply with an approved EPP. EPPs should include a reasonable time frame for completion of implementation. Full compliance date will be determined on a case-by-case basis by the agency. In response to these comments, the commission has revised §290.47(j), Appendix J to include a requirement that affected utilities include their proposed timeframe for full implementation of the EPP.

Baytown commented that, because it is a surface water treatment facility, it will be required to have permanently mounted, automatically starting generators, and cannot avail itself of the eight options available to other affected utilities. Baytown requested language to allow manually started generators when a facility is staffed 24 hours a day, as the restarting of emergency power has to be carefully carried out, with large motor loads that need to be sequenced to turn on the raw water pumps, and will require multiple generators of different voltages. Baytown further noted that it understood that it must do this for its distribution system, but disagreed that it should be required to have automatically starting generators on raw water supply pumps, when there were staff onsite 24 hours a day. Pate commented that they do not believe it was the intent of SB 361 to disallow manually started auxiliary generators to meet the requirements of SB 361. Pate further commented that a solution could be to add an additional option to the eight already existing options. The additional option would explicitly allow the use of a manually starting generator, instead of requiring a burdensome exception process.

The commission disagrees that the rule needs to be amended, because the rule captures the intent of the bill. Affected utilities that are not required to supply, provide, or convey surface water to wholesale customers will have eight options, which include automatically starting generators and any other option the commission finds acceptable. Affected utilities that furnish surface water to wholesale customers are limited to two options, automatically starting generators or distributive generation facilities. The commission clarifies that the rules do not disallow manually started auxiliary generators for affected utilities that are not required to supply, provide, or convey surface water to

wholesale customers. Therefore, an exception would not be required for manually starting generators. The commission made no changes in response to these comments.

Baytown questioned whether commission wanted affected utilities to submit information on every motor load (chemical feed pumps, heating and cooling systems, etc.).

The commission agrees that submitting information on every motor load is not required. Affected utilities are only required to provide information on that equipment that is required for production, treatment, and distribution of water in order to maintain emergency operations. No changes were made in response to this comment.

Roy Moffitt and RPI were concerned that the rule did not require a fuel supply management plan. Fuel has a short shelf life of around 12 months, so municipal utility districts (MUDs) should invest in a fuel service program. They further stated that the commission should have considered regulations that require: 1) an adequate amount of fuel storage (either bulk on site or third-party tank farm); 2) a fuel maintenance program with proof of service records; and 3) an emergency fuel service agreement. Additionally, RPI suggested that the fuel contingency plan include a minimum of 10 days run time.

The commission agrees fuel storage requirements are important. The proposed rule provides flexibility by allowing utilities the option of maintaining fuel on site, or making fuel readily available, to operate any required emergency power equipment during emergency operations. The adopted rules require an adequate amount of fuel be made available for systems that have emergency power equipment so that they can maintain emergency operations. However, the commission disagrees that it should regulate fuel storage under SB 361, as that bill does not require a fuel maintenance program with proof of service records or an emergency fuel service agreement. The commission declines to make the commenters' change regarding the fuel storage requirement of 10 days without express authority from the legislature to do so. In response to these comments, the commission amended renumbered §290.45(h)(6) to replace the 72-hour fuel requirement with the amount of fuel necessary to maintain emergency operations. In addition, the commission amended §290.47(j), Appendix J to require affected utilities to notify the commission of how they determine the quantity of fuel necessary, and how they propose to continue maintaining emergency operations.

Houston stated the bill did not require 72 hours of fuel storage; it only required that affected utilities maintain power for 24 hours. Further, Houston commented that any increase in volume of fuel on site could trigger additional regulatory requirements such as spill prevention control and counter measure plans as listed in 40 Code of Federal Regulations Part 112 and 30 TAC Chapters 327 and 334. Southwest agreed that SB 361 did not include fuel requirements. Representative Callegari commented that there were two problems associated with fuel storage: ensuring sufficient quantity and preventing attendant problems with leakage and overflow. Sugar Land commented that the 72 hours of fuel storage requirements were not part of SB 361, were onerous, and would cause numerous operational issues and excessive, unnecessary costs. ABHR commented that the 72-hour fuel supply is not financially reasonable or practicable and instead suggested limiting the fuel storage requirement to a 48-hour period. Additionally, ABHR recommended requiring fuel storage only during to the Atlantic hurricane season, June 1 through November 30 of each year. Further, ABHR recommend that, when using natural gas, natural gas users not be required to maintain on-site storage fuel supplies. J&C recommended that the commission clarify that an affected utility may enter into a fuel supply agreement to meet the 72-hour fuel requirement and suggested revisions to renumbered §290.45(h)(6).

The commission agrees that the bill does not require 72 hours of fuel storage. The proposed rule does not require that the fuel, natural gas or otherwise, be maintained on site. In response to these comments, the commission amended renumbered §290.45(h)(6) to replace the 72-hour fuel requirement with the amount of fuel necessary to maintain emergency operations. In addition, the commission amended §290.47(j), Appendix J to require affected utilities to notify the commission of how they determine the quantity of fuel necessary, and how they propose to continue maintaining emergency operations. The commission disagrees that the rule should be amended to limit the fuel storage requirement to the Atlantic hurricane season.

J&C suggested revising §290.46(f)(5)(C) by removing the word "generators" and replacing it with the phrase "auxiliary power equipment."

The commission responds that SB 361 uses the term generators in its amendment to TWC, §13.1395. Therefore, as the use of this term tracks the legislation, no change has been made in response to this comment.

J&C suggested revising §290.47(j), Appendix J by removing the word "generators" and replacing it with the phrase "auxiliary power equipment" and further recommended the removal of the language stating mutual aid agreements may not be approved in an area subject to the same natural disaster event. J&C also suggested language requiring affected utilities to evaluate the reliability of their contractual commitments be added to the rule.

The commission responds that SB 361 uses the term generator in its amendment to TWC, §13.1395. Therefore, as the use of this term tracks the legislation, the commission has made no change in response to this comment. In response to the comments regarding the mutual aid agreements, the commission amended §290.47(j), Appendix J, Plan Option 3, to clarify that the intent of SB 361 will be met by all parties in a mutual aid agreement when due consideration is given to where other water providers are located in the event that they are also affected by the same natural disaster. The commission agrees that affected utilities should continually evaluate the reliability of contractual commitments. However, under the provisions of SB 361, this responsibility lies with the commission. Therefore, no change has been made in response to this comment.

Southwest commented that affected utilities generally support the 72-hour fuel requirement, but that conditions following a natural disaster may negate any or all of the agreements for the supply of fuel or at the least cause a portion of the fuel to be diverted to higher priority uses. It also stated that the rules created competition for fuel supplies and that the proposed 72-hour requirement applied after a 24-hour period of loss of power. This would mean that the fuel used inside the first 24 hours would not count towards the 72-hour supply. Therefore, the rule would really require affected utilities to maintain a 96-hour fuel supply.

The commission responds that the 72-hour fuel supply requirement is not in SB 361. These proposed rules would require affected utilities to maintain emergency operations during an extended power outage, starting as soon as it is safe and practicable following the occurrence of a natural disaster. In response to these comments, the commission amended renumbered

§290.45(h)(6) to replace the 72-hour fuel requirement with the amount of fuel necessary to maintain emergency operations. In addition, the commission amended §290.47(j), Appendix J to require affected utilities to notify the commission of how they determine the quantity of fuel necessary, and how they propose to continue maintaining emergency operations.

Costello asked for clarification as to whether the 72 hours of fuel storage was meant to be under full load, or whether the intent was to have enough fuel to provide 72 hours of service. Jacobs Engineering supported Costello and added that 72 hours of fuel storage under full load was very different than requiring enough fuel to provide 72 hours of service.

The commission agrees that this rule language is not clear. The commission revised the adopted rule language to clarify that "under load" did not mean "under full load," but rather the load required to provide emergency operations. In response to this comment, the commission amended renumbered §290.45(h)(6) and §290.47(j), Appendix J to clarify that the fuel requirement is the amount needed to maintain emergency operations, rather than under full load.

Costello stated that engineers interpreted the rule to mean that if they met the EPP, they were no longer required to have elevated storage. Costello did not believe this was the intent. J&C commented that elevated storage requirements can be used to meet the 72-hour fuel requirement. Houston, Pate, and ABHR recommended the commission automatically grant a waiver or exception to systems with an approved EPP. Houston and Pate opposed the inclusion of §290.45(g)(5)(A)(iv) in the rule. ABHR commented that the commission improperly interpreted SB 361 to allow elevated storage to be a method of compliance with SB 361. Houston commented that the commission should delete renumbered §290.45(h)(5) as its proposed rules were redundant.

The commission agrees that SB 361 requires the commission to implement the EPP requirement as an alternative to any rule requiring elevated storage. EPPs that are used in lieu of meeting elevated storage requirements must be prepared under the direct supervision of a licensed professional engineer. In response to these comments, the commission amended §290.45 to make the EPP an alternative to elevated storage requirements, provided the affected utility can meet the pressure and flow requirements of Chapter 290, Subchapter D, under normal operating conditions. However, the commission will not grant automatic waivers or exceptions of elevated storage tank requirements upon EPP approval by the commission. The commission clarifies that such a change in pressure maintenance capacity is a significant change in accordance with §290.39(j). Accordingly, existing affected utilities are required to notify the executive director prior to making this change. Proposed new affected utilities who choose to meet the requirements of SB 361 in lieu of any rule regarding elevated storage requirements are required to include the proposed method of meeting the minimum pressure requirements in the engineering report required by §290.39(e)(1). No changes have been made in response to these comments.

Bacon & Wallace commented that the commission should consider allowing small MUDs to piggyback on larger MUDs' plans so they don't have to bear the cost that the plan imposes on their customers.

The commission has proposed rules that give affected utilities not providing surface water to wholesale customers' eight options for emergency operations. One of those options is the negotiation of leasing and contracting agreements, including emergency mutual aid agreements with other affected utilities. The commission made no changes in response to this comment.

Jacobs Engineering commented that there was no percentage of water needed to be sold to affected utilities that purchase water; for example, Houston was not required to provide a percentage of water to its purchasing water systems during emergencies. Jacobs Engineering also stated that the rule did not require wholesalers to provide certain capacities, and asked whether compliance would be strictly a contractual issue. NHRWA recommended that the commission modify its language to include water supply requirements for wholesalers.

The commission currently evaluates the capacities of purchased water systems based on their actual capacities, if any, combined with what is specified in their purchase contracts. Wholesalers must meet the sum of their contractual obligations. The proposed rule does not require wholesalers to provide any capacities beyond those specified in their contractual obligations. Alternatively, if a wholesaler and purchaser agree, they can submit an EPP that uses the option to share auxiliary generator capacity. No changes were made in response to this comment.

Sugar Land commented that the rules should be implemented in two tiers with consideration given to the systems with professional staff versus those with contract operation firms; municipalities and water providers with employees should have less onerous requirements than those that rely on contract operations for managing their system during an emergency event.

The commission disagrees that a tiered system should be implemented. SB 361 does not include provisions for implementing rules in tiers. No changes were made in response to this comment.

Southwest requested that the term "as soon as safe and practicable" be revised to read "as soon as safe and practicable as determined by the affected utility's emergency preparedness and response plan or such document."

The commission responds that the determination of when it is safe and practicable will be determined on a case-by-case basis. The commission and the affected utility may use information provided by the office of emergency management of each county and/or the Texas Division of Emergency Management, or other sources, to help assess the situation. The commission made no change in response to this comment.

Southwest requested clarification on §290.39(d) regarding whether EPPs needed to be prepared under the direction of a licensed professional engineer.

The commission does require that EPPs be prepared under the direction of a licensed professional engineer when an affected utility has been granted or is requesting an alternative capacity requirement in accordance with §290.45(g), or is requesting to meet the requirements of TWC, §13.1395 as an alternative to any rule requiring elevated storage, or as determined by the commission on a case by case basis. In response to this comment, the commission has amended the rules in both §290.39(c)(4)(A) and (o)(1) to add language that clarifies when EPPs are required to be submitted under the direction of a licensed professional engineer.

Southwest recommended that the Plan Content under §290.47(j), Appendix J should be written for the affected utilities use and should be straightforward without undue detail.

Southwest stated that the 22 items listed under this section are not all applicable and go beyond the intent of the plan, which is to supply water under emergency power. Southwest also requested that the template be reviewed by a subcommittee of TCEQ personnel and representatives from the affected utilities. J&C questioned whether §290.47(j), Appendix J is the official template for the EPP and further commented that its understanding is that this template will be released on December 1, 2009.

The commission clarifies that not all items listed in §290.47(j), Appendix J are applicable to all affected utilities as Appendix J merely outlines the minimum elements that may need to be considered in an affected utility's EPP. Section 290.47(j), Appendix J does not include a shell EPP, but the commission recognizes that an example would benefit the affected utilities and, in response to this comment, is developing a shell EPP (form 20536) that will be made available on the commission's website when complete. Form 20536 provides flexibility in the implementation of SB 361, allowing the commission to adjust it as needed without a separate rulemaking project. The commission will consider comments from the affected utilities regarding amendments to form 20536. The commission declines to form a subcommittee comprised of commission staff and representatives of affected utilities due to the short implementation requirements associated with SB 361, which require the rules to be adopted by December 1, 2009. No changes were made in response to these comments.

Richmond commented that this rule is unduly burdensome and they already have the required number of generators in place. Further, Richmond's plans include turning off its water treatments plants and evacuating with the public.

The commission responds that, at this time, based upon the Year 2000 Census data, counties other than Harris are not subject to the provisions of SB 361 or this rule. At such time that a system becomes an affected utility it can submit information showing that these rules would be a significant financial burden to its customers and request a waiver. One of the eight options in the EPP allows an affected utility to use any other alternative that is determined by the commission to be acceptable. No change was made in response to this comment.

SPH commented that the statement in §290.47(j), Appendix J that mutual aid agreements "may not be approved if the other water service provider is located in an area subject to the same natural disaster event as the affected utility" should be removed. SPH also commented that commission staff indicated at the first public hearing in Harris County that they would not approve any mutual aid agreements. The comment indicated that mutual aid agreements should instead be encouraged, especially as that may be the only option for some affected utilities to comply with SB 361.

The commission responds that the provision referenced above was included in §290.47(j), Appendix J because the TCEQ's experience following natural disasters has indicated that multiple water systems that are located near each other are frequently affected equally by a natural disaster and the corresponding loss of power. Therefore, it may not be of benefit to an affected utility to have a mutual aid agreement with a nearby affected utility or other water system. The commission's staff will consider all mutual aid agreements and will be reviewing the locations of the affected utilities that have entered into such an agreement during its review. Each EPP will be reviewed on an individual basis. If the commission determines that it meets the requirements of SB 361 by providing adequate protection for emergency operations without relying on affected utilities in the vicinity that may also be affected by the natural disaster, and therefore be unable to respond in accordance with the terms of the mutual aid agreement, it will be deemed adequate until demonstrated otherwise. The commission reviewed the transcript record of the Houston public hearing and was not able to find the source of the mutual aid rejection comment. However, the commission clarifies that it will consider all mutual aid agreements submitted as part of an EPP. No changes have been made in response to these comments.

SPH requested clarification as to whether the proposed §290.45(g)(5)(A)(iv) would require two affected utilities that individually have less than 2,500 connections and who operate as a single system with more than 2,500 connections through a mutual aid agreement during emergencies be required to conduct hydraulic modeling.

The commission clarifies that §290.45(g)(5)(A)(iv) does not impact all affected utilities. This rule only applies to public water systems that are affected utilities and are requesting alternative pressure maintenance capacity requirements. Two affected utilities that are each less than 2,500 connections and operate as a single system with more than 2,500 connections only during emergency operations are not considered to have a permanently open interconnect in accordance with §290.45(b)(1)(D)(i). These affected utilities will not be evaluated as a single system and thus will not be required to conduct hydraulic modeling as part of their EPP unless they are proposing to meet the SB 361 requirements in lieu of any rule requiring elevated storage, or have obtained or plan to request an alternative capacity requirement. No changes have been made in response to these comments.

SPH asked whether water systems that purchase water but do not have any production, storage, service pump, or pressure maintenance capacity should be considered affected utilities, since they would derive no benefit from facilities such as purchased or leased generators, hardened electrical lines, or right angle drives.

The commission responds that the requirements of the rule apply to purchase water systems. Under this rule, these systems have the option of using wholesale emergency power capacity to meet the provisions of SB 361 which allows the sharing of auxiliary generator capacity with one or more affected utilities. Further, the commission responds that a copy of the purchase water contract or agreement will need to be included as part of the EPP. No changes have been made in response to these comments.

STATUTORY AUTHORITY

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Texas Health and Safety Code (THSC), §341.0315, which requires public water systems to comply with commission rules adopted to ensure the supply of safe drinking water.

The adopted amendments implement TWC, §13.1395.

§290.38. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. If a word or term used in this chapter is not contained in the following list, its definition shall be as shown in Title 40 Code of Federal Regulations (CFR) §141.2. Other technical terms used shall have the meanings or definitions listed in the latest edition of *The Drinking Water Dictionary,* prepared by the American Water Works Association.

(1) Affected utility--A retail public utility (§291.3 of this title (relating to Definitions of Terms)), exempt utility (§291.3 of this title), or provider or conveyor of potable or raw water service that furnishes water service to more than one customer:

(A) in a county with a population of 3.3 million or more; or

(B) in a county with a population of 400,000 or more adjacent to a county with a population of 3.3 million or more.

(2) Air gap--The unobstructed vertical distance through the free atmosphere between the lowest opening from any pipe or faucet conveying water to a tank, fixture, receptor, sink, or other assembly and the flood level rim of the receptacle. The vertical, physical separation must be at least twice the diameter of the water supply outlet, but never less than 1.0 inch.

(3) ANSI standards--The standards of the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

(4) Approved laboratory--A laboratory certified and approved by the commission to analyze water samples to determine their compliance with maximum allowable constituent levels.

(5) ASME standards--The standards of the American Society of Mechanical Engineers, 346 East 47th Street, New York, New York 10017.

(6) ASTM standards--The standards of the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19102.

(7) Auxiliary power--Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as auxiliary power in areas which are not subject to large scale power outages due to natural disasters.

(8) AWWA standards--The latest edition of the applicable standards as approved and published by the American Water Works Association, 6666 West Quincy Avenue, Denver, Colorado 80235.

(9) Bag Filter--Pressure-driven separation device that removes particulate matter larger than 1 micrometer using an engineered porous filtration media. They are typically constructed of a non-rigid, fabric filtration media housed in a pressure vessel in which the direction of flow is from the inside of the bag to the outside.

(10) Cartridge filter--Pressure-driven separation device that removes particulate matter larger than 1 micrometer using an engineered porous filtration media. They are typically constructed as rigid or semi-rigid, self-supporting filter elements housed in pressure vessels in which flow is from the outside of the cartridge to the inside.

(11) Certified laboratory--A laboratory certified by the commission to analyze water samples to determine their compliance with maximum allowable constituent levels.

(12) Challenge test--A study conducted to determine the removal efficiency (log removal value) of a device for a particular organism, particulate, or surrogate.

(13) Chemical disinfectant--Any oxidant, including but not limited to chlorine, chlorine dioxide, chloramines, and ozone added to the water in any part of the treatment or distribution process, that is intended to kill or inactivate pathogenic microorganisms.

(14) Community water system--A public water system which has a potential to serve at least 15 residential service connections on a year-round basis or serves at least 25 residents on a year-round basis.

(15) Connection--A single family residential unit or each commercial or industrial establishment to which drinking water is supplied from the system. As an example, the number of service connections in an apartment complex would be equal to the number of individual apartment units. When enough data is not available to accurately determine the number of connections to be served or being served, the population served divided by three will be used as the number of connections for calculating system capacity requirements. Conversely, if only the number of connections is known, the connection total multiplied by three will be the number used for population served. For the purposes of this definition, a dwelling or business which is connected to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection if:

(A) the water is used exclusively for purposes other than those defined as human consumption (see human consumption);

(B) the executive director determines that alternative water to achieve the equivalent level of public health protection provided by the drinking water standards is provided for residential or similar human consumption, including, but not limited to, drinking and cooking; or

(C) the executive director determines that the water provided for residential or similar human consumption is centrally treated or is treated at the point of entry by a provider, a pass through entity, or the user to achieve the equivalent level of protection provided by the drinking water standards.

(16) Contamination--The presence of any foreign substance (organic, inorganic, radiological or biological) in water which tends to degrade its quality so as to constitute a health hazard or impair the usefulness of the water.

(17) Cross-connection--A physical connection between a public water system and either another supply of unknown or questionable quality, any source which may contain contaminating or polluting substances, or any source of water treated to a lesser degree in the treatment process.

(18) Direct integrity test--A physical test applied to a membrane unit in order to identify and isolate integrity breaches/leaks that could result in contamination of the filtrate.

(19) Disinfectant--A chemical or a treatment which is intended to kill or inactivate pathogenic microorganisms in water.

(20) Disinfection--A process which inactivates pathogenic organisms in the water by chemical oxidants or equivalent agents.

(21) Distribution system--A system of pipes that conveys potable water from a treatment plant to the consumers. The term includes pump stations, ground and elevated storage tanks, potable water mains, and potable water service lines and all associated valves, fittings, and meters, but excludes potable water customer service lines.

(22) Drinking water--All water distributed by any agency or individual, public or private, for the purpose of human consumption or which may be used in the preparation of foods or beverages or for the cleaning of any utensil or article used in the course of preparation or consumption of food or beverages for human beings. The term "Drinking Water" shall also include all water supplied for human consumption or used by any institution catering to the public.

(23) Drinking water standards--The commission rules covering drinking water standards in Subchapter F of this chapter (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Systems).

(24) Elevated storage capacity--That portion of water which can be stored at least 80 feet above the highest service connection in the pressure plane served by the storage tank.

(25) Emergency operations--The operation of an affected utility during an extended power outage at a minimum water pressure of 35 pounds per square inch.

(26) Emergency power--Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as emergency power in areas which are not subject to large scale power outages due to natural disasters.

(27) Extended power outage--a power outage lasting for more than 24 hours.

(28) Filtrate--The water produced from a filtration process; typically used to describe the water produced by filter processes such as membranes.

(29) Groundwater--Any water that is located beneath the surface of the ground and is not under the direct influence of surface water.

(30) Groundwater under the direct influence of surface water--Any water beneath the surface of the ground with:

(A) significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as *Giardia lamblia* or *Cryptosporidium;* or

(B) significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions.

(31) Health hazard--A cross-connection, potential contamination hazard, or other situation involving any substance that can cause death, illness, spread of disease, or has a high probability of causing such effects if introduced into the potable drinking water supply.

(32) Human consumption--Uses by humans in which water can be ingested into or absorbed by the human body. Examples of these uses include, but are not limited to drinking, cooking, brushing teeth, bathing, washing hands, washing dishes, and preparing foods.

(33) Indirect integrity monitoring--The monitoring of some aspect of filtrate water quality, such as turbidity, that is indicative of the removal of particulate matter.

(34) Innovative/alternate treatment--Any treatment process that does not have specific design requirements in §290.42(a) - (f) of this title (relating to Water Treatment). For example, the adjustment of fluoride ion content, special treatment for metals, iron, manganese, organic and inorganic contaminant reduction, special methods for taste and odor control, demineralization, corrosion control processes, membrane filtration, bag/cartridge filters, ozone, chlorine dioxide, Ultraviolet (UV) light disinfection, and other treatment processes.

(35) Interconnection--A physical connection between two public water supply systems.

(36) International Fire Code (IFC)--The standards of the International Code Council, 500 New Jersey Avenue, NW, 6th Floor, Washington, DC 20001.

(37) Intruder-resistant fence--A fence six feet or greater in height, constructed of wood, concrete, masonry, or metal with three strands of barbed wire extending outward from the top of the fence at a 45 degree angle with the smooth side of the fence on the outside wall. In lieu of the barbed wire, the fence must be eight feet in height. The fence must be in good repair and close enough to surface grade to prevent intruder passage.

(38) L/d ratio--The dimensionless value that is obtained by dividing the length (depth) of a granular media filter bed by the weighted effective diameter "d" of the filter media. The weighted effective diameter of the media is calculated based on the percentage of the total bed depth contributed by each media layer.

(39) Licensed professional engineer--An engineer who maintains a current license through the Texas Board of Professional Engineers in accordance with its requirements for professional practice.

(40) Log removal value (LRV)--Removal efficiency for a target organism, particulate, or surrogate expressed as $\log_{10}$ (i.e., $\log_{10}$ (feed concentration) - $\log_{10}$ (filtrate concentration).

(41) Maximum daily demand--In the absence of verified historical data or in cases where a public water system has imposed mandatory water use restrictions within the past 36 months, maximum daily demand means 2.4 times the average daily demand of the system.

(42) Maximum contaminant level (MCL)--The MCL for a specific contaminant is defined in the section relating to that contaminant.

(43) Membrane filtration--A pressure or vacuum driven separation process in which particulate matter larger than one micrometer is rejected by an engineered barrier, primarily through a size-exclusion mechanism, and which has a measurable removal efficiency of a target organism that can be verified through the application of a direct integrity test; includes the following common membrane classifications microfiltration (MF), ultrafiltration (UF), nanofiltration (NF), and reverse osmosis (RO), as well as any "membrane cartridge filtration" (MCF) device that satisfies this definition.

(44) Membrane $LRV_{C\text{-}Test}$--The number that reflects the removal efficiency of the membrane filtration process demonstrated during challenge testing. The value is based on the entire set of LRVs obtained during challenge testing, with one representative LRV established per module tested.

(45) Membrane module--The smallest component of a membrane unit in which a specific membrane surface area is housed in a device with a filtrate outlet structure.

(46) Membrane sensitivity--The maximum log removal value (LRV) that can be reliably verified by a direct integrity test.

(47) Membrane unit--A group of membrane modules that share common valving, which allows the unit to be isolated from the rest of the system for the purpose of integrity testing or other maintenance.

(48) Milligrams per liter (mg/L)--A measure of concentration, equivalent to and replacing parts per million in the case of dilute solutions.

(49) Monthly reports of water works operations--The daily record of data relating to the operation of the system facilities compiled in a monthly report.

(50) National Fire Protection Association (NFPA) standards--The standards of the NFPA, 1 Batterymarch Park, Quincy, Massachusetts, 02269-9101.

(51) National Sanitation Foundation (NSF)--The NSF or reference to the listings developed by the foundation, P.O. Box 1468, Ann Arbor, Michigan 48106.

(52) Noncommunity water system--Any public water system which is not a community system.

(53) Nonhealth hazard--A cross-connection, potential contamination hazard, or other situation involving any substance that generally will not be a health hazard, but will constitute a nuisance, or be aesthetically objectionable, if introduced into the public water supply.

(54) Nontransient noncommunity water system--A public water system that is not a community water system and regularly serves at least 25 of the same persons at least six months out of the year.

(55) psi--Pounds per square inch.

(56) Peak hourly demand--In the absence of verified historical data, peak hourly demand means 1.25 times the maximum daily demand (prorated to an hourly rate) if a public water supply meets the commission's minimum requirements for elevated storage capacity and 1.85 times the maximum daily demand (prorated to an hourly rate) if the system uses pressure tanks or fails to meet the commission's minimum elevated storage capacity requirement.

(57) Plumbing inspector--Any person employed by a political subdivision for the purpose of inspecting plumbing work and installations in connection with health and safety laws and ordinances, who has no financial or advisory interest in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Texas State Board of Plumbing Examiners.

(58) Plumbing ordinance--A set of rules governing plumbing practices which is at least as stringent and comprehensive as one of the following nationally recognized codes:

(A) the International Plumbing Code; or

(B) the Uniform Plumbing Code.

(59) Potable water customer service line--The sections of potable water pipe between the customer's meter and the customer's point of use.

(60) Potable water service line--The section of pipe between the potable water main to the customer's side of the water meter. In cases where no customer water meter exists, it is the section of pipe that is under the ownership and control of the public water system.

(61) Potable water main--A pipe or enclosed constructed conveyance operated by a public water system which is used for the transmission or distribution of drinking water to a potable water service line.

(62) Potential contamination hazard--A condition which, by its location, piping or configuration, has a reasonable probability of being used incorrectly, through carelessness, ignorance, or negligence, to create or cause to be created a backflow condition by which contamination can be introduced into the water supply. Examples of potential contamination hazards are:

(A) bypass arrangements;

(B) jumper connections;

(C) removable sections or spools; and

(D) swivel or changeover assemblies.

(63) Process control duties--Activities that directly affect the potability of public drinking water, including: making decisions regarding the day-to-day operations and maintenance of public water system production and distribution; maintaining system pressures; determining the adequacy of disinfection and disinfection procedures; taking routine microbiological samples; taking chlorine residuals and microbiological samples after repairs or installation of lines or appurtenances; and operating chemical feed systems, filtration, disinfection, or pressure maintenance equipment; or performing other duties approved by the executive director.

(64) Public drinking water program--Agency staff designated by the executive director to administer the Safe Drinking Water Act and state statutes related to the regulation of public drinking water. Any report required to be submitted in this chapter to the executive director must be submitted to the Texas Commission on Environmental Quality, Water Supply Division, MC 155, P.O. Box 13087, Austin, Texas 78711-3087.

(65) Public health engineering practices--Requirements in this subchapter or guidelines promulgated by the executive director.

(66) Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. This term includes; any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.

(67) Quality Control Release Value (QCRV)--A minimum quality standard of a non-destructive performance test (NDPT) established by the manufacturer for membrane module production that ensures that the module will attain the targeted log removal value (LRV) demonstrated during challenge testing.

(68) Reactor Validation Testing--A process by which a full-scale UV reactor's disinfection performance is determined relative to operating parameters that can be monitored. These parameters include flow rate, UV intensity as measured by a UV sensor and the UV lamp status.

(69) Resolution--The size of the smallest integrity breach that contributes to a response from a direct integrity test in membranes used to treat surface water or groundwater under the direct influence of surface water.

(70) Sanitary control easement--A legally binding document securing all land, within 150 feet of a public water supply well location, from pollution hazards. This document must fully describe the location of the well and surrounding lands and must be filed in the county records to be legally binding.

(71) Sanitary survey--An onsite review of the water source, facilities, equipment, operation and maintenance of a public water system, for the purpose of evaluating the adequacy for producing and distributing safe drinking water.

(72) Sensitivity--The maximum log removal value (LRV) that can be reliably verified by a direct integrity test in membranes used to treat surface water or groundwater under the direct influence of surface water; also applies to some continuous indirect integrity monitoring methods.

(73) Service line--A pipe connecting the utility service provider's main and the water meter, or for wastewater, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(74) Service pump--Any pump that takes treated water from storage and discharges to the distribution system.

(75) Transfer pump--Any pump which conveys water from one point to another within the treatment process or which conveys water to storage facilities prior to distribution.

(76) Transient noncommunity water system--A public water system that is not a community water system and serves at least 25 persons at least 60 days out of the year, yet by its characteristics, does not meet the definition of a nontransient noncommunity water system.

(77) Wastewater lateral--Any pipe or constructed conveyance carrying wastewater, running laterally down a street, alley, or easement, and receiving flow only from the abutting properties.

(78) Wastewater main--Any pipe or constructed conveyance which receives flow from one or more wastewater laterals.

§290.39. General Provisions.

(a) Authority for requirements. Texas Health and Safety Code (THSC), Chapter 341, Subchapter C prescribes the duties of the commission relating to the regulation and control of public drinking water systems in the state. The statute requires that the commission ensure that public water systems: supply safe drinking water in adequate quantities, are financially stable and technically sound, promote use of regional and area-wide drinking water systems, and review completed plans and specifications and business plans for all contemplated public water systems not exempted by THSC, §341.035(d). The statute also requires the commission be notified of any subsequent material changes, improvements, additions, or alterations in existing systems and, consider compliance history in approving new or modified public water systems. Texas Water Code (TWC), Chapter 13, Subchapter E, §13.1395, prescribes the duties of the commission relating to standards for emergency operations of affected utilities. The statute requires that the commission ensure that affected utilities provide water service as soon as safe and practicable during an extended power outage following the occurrence of a natural disaster.

(b) Reason for this subchapter and minimum criteria. This subchapter has been adopted to ensure regionalization and area-wide options are fully considered, the inclusion of all data essential for comprehensive consideration of the contemplated project, or improvements, additions, alterations, or changes thereto and to establish minimum standardized public health design criteria in compliance with existing state statutes and in accordance with good public health engineering practices. In addition, minimum acceptable financial, managerial, technical, and operating practices must be specified to ensure that facilities are properly operated to produce and distribute a safe, potable water.

(c) Required actions and approvals prior to construction. A person may not begin construction of a public drinking water supply system unless the executive director determines the following requirements have been satisfied and approves construction of the proposed system.

(1) A person proposing to install a public drinking water system within the extraterritorial jurisdiction of a municipality; or within 1/2-mile of the corporate boundaries of a district, or other political subdivision providing the same service; or within 1/2-mile of a certificated service area boundary of any other water service provider shall provide to the executive director evidence that:

(A) written application for service was made to that provider; and

(B) all application requirements of the service provider were satisfied, including the payment of related fees.

(2) A person may submit a request for an exception to the requirements of paragraph (1) of this subsection if the application fees will create a hardship on the person. The request must be accompanied by evidence documenting the financial hardship.

(3) A person who is not required to complete the steps in paragraph (1) of this subsection, or who completes the steps in paragraph (1) of this subsection and is denied service or determines that the existing provider's cost estimate is not feasible for the development to be served, shall submit to the executive director:

(A) plans and specifications for the system; and

(B) a business plan for the system.

(4) Emergency Preparedness Plan for Public Water Systems that are Affected Utilities.

(A) Each public water system that is also an affected utility, as defined by §290.38(1) of this title (relating to Definitions), is required to submit to the executive director, receive approval for, and adopt an emergency preparedness plan in accordance with §290.45 of this title (relating to Minimum Water System Capacity Requirements) using either the template in Appendix J of §290.47 of this title (relating to Appendices) or another emergency preparedness plan that meets the requirements of this section. Emergency preparedness plans are required to be prepared under the direction of a licensed professional engineer when an affected utility has been granted or is requesting an alternative capacity requirement in accordance with §290.45(g) of this title, or is requesting to meet the requirements of TWC, §13.1395, as an alternative to any rule requiring elevated storage, or as determined by the executive director on a case by case basis.

(B) Each affected utility that supplies, provides, or conveys surface water to wholesale customers shall include in its emergency preparedness plan under subparagraph (A) of this paragraph provision for the actual installation and maintenance of automatically starting auxiliary generators or distributive generation facilities for each raw water intake pump station, water treatment plant, pump station, and pressure facility necessary to provide water to its wholesale customers.

(C) The executive director shall review an emergency preparedness plan submitted under subparagraph (A) of this paragraph. If the executive director determines that the plan is not acceptable, the executive director shall recommend changes to the plan. The executive director must make its recommendations on or before the 90th day

after the executive director receives the plan. In accordance with commission rules, an emergency preparedness plan must include one of the options listed in §290.45(h)(1)(A) - (H) of this title.

(D) Each affected utility shall install any required equipment to implement the emergency preparedness plan approved by the executive director immediately upon operation.

(E) The executive director may grant a waiver of the requirements for emergency preparedness plans to an affected utility if the executive director determines that compliance with this section will cause a significant financial burden on customers of the affected utility. The affected utility shall submit financial, managerial, and technical information as requested by the executive director to demonstrate the financial burden.

(d) Submission of plans.

(1) Plans, specifications, and related documents will not be considered unless they have been prepared under the direction of a licensed professional engineer. All engineering documents must have engineering seals, signatures, and dates affixed in accordance with the rules of the Texas Board of Professional Engineers.

(2) Detailed plans must be submitted for examination at least 30 days prior to the time that approval, comments or recommendations are desired. From this, it is not to be inferred that final action will be forthcoming within the time mentioned.

(3) The limits of approval are as follows.

(A) The commission's public drinking water program furnishes consultation services as a reviewing body only, and its licensed professional engineers may neither act as design engineers nor furnish detailed estimates.

(B) The commission's public drinking water program does not examine plans and specifications in regard to the structural features of design, such as strength of concrete or adequacy of reinforcing. Only the features covered by this subchapter will be reviewed.

(C) The consulting engineer and/or owner must provide surveillance adequate to assure that facilities will be constructed according to approved plans and must notify the executive director in writing upon completion of all work. Planning materials shall be submitted to the Texas Commission on Environmental Quality, Water Supply Division, MC 153, P.O. Box 13087, Austin, Texas 78711-3087.

(e) Submission of planning material. In general, the planning material submitted shall conform to the following requirements.

(1) Engineering reports are required for new water systems and all surface water treatment plants. Engineering reports are also required when design or capacity deficiencies are identified in an existing system. The engineering report shall include, at least, coverage of the following items:

(A) statement of the problem or problems;

(B) present and future areas to be served, with population data;

(C) the source, with quantity and quality of water available;

(D) present and estimated future maximum and minimum water quantity demands;

(E) description of proposed site and surroundings for the water works facilities;

(F) type of treatment, equipment, and capacity of facilities;

(G) basic design data, including pumping capacities, water storage and flexibility of system operation under normal and emergency conditions; and

(H) the adequacy of the facilities with regard to delivery capacity and pressure throughout the system.

(2) All plans and drawings submitted may be printed on any of the various papers which give distinct lines. All prints must be clear, legible and assembled to facilitate review.

(A) The relative location of all facilities which are pertinent to the specific project shall be shown.

(B) The location of all abandoned or inactive wells within 1/4-mile of a proposed well site shall be shown or reported.

(C) If staged construction is anticipated, the overall plan shall be presented, even though a portion of the construction may be deferred.

(D) A general map or plan of the municipality, water district, or area to be served shall accompany each proposal for a new water supply system.

(3) Specifications for construction of facilities shall accompany all plans. If a process or equipment which may be subject to probationary acceptance because of limited application or use in Texas is proposed, the executive director may give limited approval. In such a case, the owner must be given a bonded guarantee from the manufacturer covering acceptable performance. The specifications shall include a statement that such a bonded guarantee will be provided to the owner and shall also specify those conditions under which the bond will be forfeited. Such a bond will be transferable. The bond shall be retained by the owner and transferred when a change in ownership occurs.

(4) A copy of each fully executed sanitary control easement and any other documentation demonstrating compliance with §290.41(c)(1)(F) of this title (relating to Water Sources) shall be provided to the executive director prior to placing the well into service. Each original easement document, if obtained, must be recorded in the deed records at the county courthouse. Section 290.47(c) of this title includes a suggested form.

(5) Construction features and siting of all facilities for new water systems and for major improvements to existing water systems must be in conformity with applicable commission rules.

(f) Submission of business plans. The prospective owner of the system or the person responsible for managing and operating the system must submit a business plan to the executive director that demonstrates that the owner or operator of the system has available the financial, managerial, and technical capability to ensure future operation of the system in accordance with applicable laws and rules. The executive director may order the prospective owner or operator to demonstrate financial assurance to operate the system in accordance with applicable laws and rules as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), or as specified by commission rule, unless the executive director finds that the business plan demonstrates adequate financial capability. A business plan shall include the information and be presented in a format prescribed by the executive director. For community water systems, the business plan shall contain, at a minimum, the following elements:

(1) description of areas and population to be served by the potential system;

(2) description of drinking water supply systems within a two-mile radius of the proposed system, copies of written requests seeking to obtain service from each of those drinking water supply systems, and copies of the responses to the written requests;

(3) time line for construction of the system and commencement of operations;

(4) identification of and costs of alternative sources of supply;

(5) selection of the alternative to be used and the basis for that selection;

(6) identification of the person or entity which owns or will own the drinking water system and any identifiable future owners of the drinking water system;

(7) identification of any other businesses and public drinking water system(s) owned or operated by the applicant, owner(s), parent organization, and affiliated organization(s);

(8) an operations and maintenance plan which includes sufficient detail to support the budget estimate for operation and maintenance of the facilities;

(9) assurances that the commitments and resources needed for proper operation and maintenance of the system are, and will continue to be, available, including the qualifications of the organization and each individual associated with the proposed system;

(10) for retail public utilities as defined by TWC, §13.002:

(A) projected rate revenue from residential, commercial, and industrial customers; and

(B) pro forma income, expense, and cash flow statements;

(11) identification of any appropriate financial assurance, including those being offered to capital providers;

(12) a notarized statement signed by the owner or responsible person that the business plan has been prepared under his direction and that he is responsible for the accuracy of the information; and

(13) other information required by the executive director to determine the adequacy of the business plan or financial assurance.

(g) Business plans not required. A person is not required to file a business plan if the person:

(1) is a county;

(2) is a retail public utility as defined by TWC, §13.002, unless that person is a utility as defined by that section;

(3) has executed an agreement with a political subdivision to transfer the ownership and operation of the water supply system to the political subdivision; or

(4) is a noncommunity nontransient water system and the person has demonstrated financial assurance under THSC, Chapter 361 or 382 or TWC, Chapter 26.

(h) Beginning and completion of work.

(1) No person may begin construction on a new public water system before receiving written approval of plans and specifications and, if required, approval of a business plan from the executive director. No person may begin construction of modifications to a public water system without providing notification to the executive director and submitting and receiving approval of plans and specifications if requested in accordance with subsection (j) of this section.

(2) The executive director shall be notified in writing by the design engineer or the owner before construction is started.

(3) Upon completion of the water works project, the engineer or owner shall notify the executive director in writing as to its completion and attest to the fact that the completed work is substantially in accordance with the plans and change orders on file with the commission.

(i) Changes in plans and specifications. Any addenda or change orders which may involve a health hazard or relocation of facilities, such as wells, treatment units, and storage tanks, shall be submitted to the executive director for review and approval.

(j) Changes in existing systems or supplies. Public water systems shall notify the executive director prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities. Public water systems shall submit plans and specifications for the proposed changes upon request. Changes to an existing disinfection process at a treatment plant that treats surface water or groundwater that is under the direct influence of surface water shall not be instituted without the prior approval of the executive director.

(1) The following changes are considered to be significant:

(A) proposed changes to existing systems which result in an increase or decrease in production, treatment, storage, or pressure maintenance capacity;

(B) proposed changes to the disinfection process used at plants that treat surface water or groundwater that is under the direct influence of surface water including changes involving the disinfectants used, the disinfectant application points, or the disinfectant monitoring points;

(C) proposed changes to the type of disinfectant used to maintain a disinfectant residual in the distribution system;

(D) proposed changes in existing distribution systems when the change is greater than 10% of the existing distribution capacity or 250 connections, whichever is smaller, or results in the water system's inability to comply with any of the applicable capacity requirements of §290.45 of this title;

(E) proposed replacement or change of membranes modules; and

(F) any other material changes specified by the executive director.

(2) The executive director shall determine whether engineering plans and specifications will be required after reviewing the initial notification regarding the nature and extent of the modifications.

(A) Upon request of the executive director, the water system shall submit plans and specifications in accordance with the requirements of subsection (d) of this section.

(B) Unless plans and specifications are required by Chapter 293 of this title (relating to Water Districts), the executive director will not require another state agency or a political subdivision to submit planning material on distribution line improvements if the entity has its own internal review staff and complies with all of the following criteria:

(i) the internal review staff includes one or more licensed professional engineers that are employed by the political subdivision and must be separate from, and not subject to the review or supervision of, the engineering staff or firm charged with the design of the distribution extension under review;

(ii) a licensed professional engineer on the internal review staff determines and certifies in writing that the proposed distribution system changes comply with the requirements of §290.44 of this title (relating to Water Distribution) and will not result in a violation of any provision of §290.45 of this title;

(iii) the state agency or political subdivision includes a copy of the written certification described in this subparagraph with the initial notice that is submitted to the executive director.

(C) Unless plans and specifications are required by Chapter 293 of this title, the executive director will not require planning material on distribution line improvements from any public water system that is required to submit planning material to another state agency or political subdivision that complies with the requirements of subparagraph (B) of this paragraph. The notice to the executive director must include a statement that a state statute or local ordinance requires the planning materials to be submitted to the other state agency or political subdivision and a copy of the written certification that is required in subparagraph (B) of this paragraph.

(3) If a certificate of convenience and necessity (CCN) is required or must be amended, the CCN application must be included with the notice to the executive director.

(k) Planning material acceptance. Planning material for improvements to an existing system which does not meet the requirements of all sections of this subchapter will not be considered unless the necessary modifications for correcting the deficiencies are included in the proposed improvements, or unless the executive director determines that reasonable progress is being made toward correcting the deficiencies and no immediate health hazard will be caused by the delay.

(l) Exceptions. Requests for exceptions to one or more of the requirements in this subchapter shall be considered on an individual basis. Any water system which requests an exception must demonstrate to the satisfaction of the executive director that the exception will not compromise the public health or result in a degradation of service or water quality.

(1) The exception must be requested in writing and must be substantiated by carefully documented data. The request for an exception shall precede the submission of engineering plans and specifications for a proposed project for which an exception is being requested.

(2) Any exception granted by the commission is subject to revocation.

(3) Any request for an exception which is not approved by the commission in writing is denied.

(4) The executive director may establish site specific design, operation, maintenance, and reporting requirements for systems that have been issued an exception to the subchapter.

(m) Notification of system startup or reactivation. The owner or responsible official must provide written notification to the commission of the startup of a new public water supply system or reactivation of an existing public water supply system. This notification must be made immediately upon meeting the definition of a public water system as defined in §290.38 of this title.

(n) The commission may require the owner or operator of a public drinking water supply system that was constructed without the approval required by THSC, §341.035, that has a history of noncompliance with THSC, Chapter 341, Subchapter C or commission rules, or that is subject to a commission enforcement action to take the following action:

(1) provide the executive director with a business plan that demonstrates that the system has available the financial, managerial, and technical resources adequate to ensure future operation of the system in accordance with applicable laws and rules. The business plan must fulfill all the requirements for a business plan as set forth in subsection (f) of this section;

(2) provide adequate financial assurance of the ability to operate the system in accordance with applicable laws and rules. The executive director will set the amount of the financial assurance, after the business plan has been reviewed and approved by the executive director.

(A) The amount of the financial assurance will equal the difference between the amount of projected system revenues and the projected cash needs for the period of time prescribed by the executive director.

(B) The form of the financial assurance will be as specified in Chapter 37, Subchapter O of this title and will be as specified by the executive director.

(C) If the executive director relies on rate increases or customer surcharges as the form of financial assurance, such funds shall be deposited in an escrow account as specified in Chapter 37, Subchapter O of this title and released only with the approval of the executive director.

(o) Emergency Preparedness Plans for Affected Utilities.

(1) Each public water system that is also an affected utility and that exists as of December 1, 2009 is required to adopt and submit to the executive director an emergency preparedness plan in accordance with §290.45 of this title and using the template in Appendix J of §290.47 of this title or another emergency preparedness plan that meets the requirements of this subchapter no later than March 1, 2010. Emergency preparedness plans are required to be prepared under the direction of a licensed professional engineer when an affected utility has been granted or is requesting an alternative capacity requirement in accordance with §290.45(g) of this title, or is requesting to meet the requirements of TWC, §13.1395, as an alternative to any rule requiring elevated storage, or as determined by the executive director on a case by case basis.

(2) Each affected utility that supplies, provides, or conveys surface water to wholesale customers shall include in its emergency preparedness plan under this subsection provisions for the actual installation and maintenance of automatically starting auxiliary generators or distributive generation facilities for each raw water intake pump station, water treatment plant, pump station, and pressure facility necessary to provide water to its wholesale customers.

(3) The executive director shall review an emergency preparedness plan submitted under this subsection. If the executive director determines that the plan is not acceptable, the executive director shall recommend changes to the plan. The executive director must make its recommendations on or before the 90th day after the executive director receives the plan. In accordance with the commission rules, an emergency preparedness plan must include one of the options listed in §290.45(h)(1)(A) - (H) of this title.

(4) Not later than July 1, 2010, each affected utility shall implement the emergency preparedness plan approved by the executive director.

(5) An affected utility may file with the executive director a written request for an extension not to exceed 90 days, of the date by which the affected utility is required under this subsection to submit the affected utility's emergency preparedness plan or of the date by which

the affected utility is required under this subsection to implement the affected utility's emergency preparedness plan. The executive director may approve the requested extension for good cause shown.

(6) The executive director may grant a waiver of the requirements for emergency preparedness plans to an affected utility if the executive director determines that compliance with this section will cause a significant financial burden on customers of the affected utility. The affected utility shall submit financial, managerial, and technical information as requested by the executive director to demonstrate the financial burden.

§290.45. Minimum Water System Capacity Requirements.

(a) General provisions.

(1) The requirements contained in this section are to be used in evaluating both the total capacities for public water systems and the capacities at individual pump stations and pressure planes which serve portions of the system that are hydraulically separated from, or incapable of being served by, other pump stations or pressure planes. The capacities specified in this section are minimum requirements only.

(2) The executive director will require additional supply, storage, service pumping, and pressure maintenance facilities if a normal operating pressure of 35 pounds per square inch (psi) cannot be maintained throughout the system, or if the system's maximum daily demand exceeds its total production and treatment capacity. The executive director will also require additional capacities if the system is unable to maintain a minimum pressure of 20 psi during fire fighting, line flushing, and other unusual conditions.

(3) The executive director may establish additional capacity requirements for a public water system using the method of calculation described in subsection (g)(2) of this section if there are repeated customer complaints regarding inadequate pressure or if the executive director receives a request for a capacity evaluation from customers of the system.

(4) Throughout this section, total storage capacity does not include pressure tank capacity.

(5) The executive director may exclude the capacity of facilities that have been inoperative for the past 120 days and will not be returned to an operative condition within the next 30 days when determining compliance with the requirements of this section.

(6) The capacity of the treatment facilities shall not be less than the required raw water or groundwater production rate or the anticipated maximum daily demand of the system.

(7) If a public water system that is an affected utility fails to provide a minimum of 35 psi throughout the distribution system during emergency operations as soon as it is safe and practicable following the occurrence of a natural disaster, a revised emergency preparedness plan or justification regarding pressure drop shall be submitted for review and approval within 180 days of the date normal power is restored. Based on the review of the revised emergency preparedness plan, the executive director may require additional or alternative auxiliary emergency facilities.

(b) Community water systems.

(1) Groundwater supplies must meet the following requirements.

(A) If fewer than 50 connections without ground storage, the system must meet the following requirements:

(i) a well capacity of 1.5 gallons per minute (gpm) per connection; and

(ii) a pressure tank capacity of 50 gallons per connection.

(B) If fewer than 50 connections with ground storage, the system must meet the following requirements:

(i) a well capacity of 0.6 gpm per connection;

(ii) a total storage capacity of 200 gallons per connection;

(iii) two or more service pumps having a total capacity of 2.0 gpm per connection; and

(iv) a pressure tank capacity of 20 gallons per connection.

(C) For 50 to 250 connections, the system must meet the following requirements:

(i) a well capacity of 0.6 gpm per connection;

(ii) a total storage capacity of 200 gallons per connection;

(iii) two or more pumps having a total capacity of 2.0 gpm per connection at each pump station or pressure plane. For systems which provide an elevated storage capacity of 200 gallons per connection, two service pumps with a minimum combined capacity of 0.6 gpm per connection are required at each pump station or pressure plane. If only wells and elevated storage are provided, service pumps are not required; and

(iv) an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection.

(D) For more than 250 connections, the system must meet the following requirements:

(i) two or more wells having a total capacity of 0.6 gpm per connection. Where an interconnection is provided with another acceptable water system capable of supplying at least 0.35 gpm for each connection in the combined system under emergency conditions, an additional well will not be required as long as the 0.6 gpm per connection requirement is met for each system on an individual basis. Each water system must still meet the storage and pressure maintenance requirements on an individual basis unless the interconnection is permanently open. In this case, the systems' capacities will be rated as though a single system existed;

(ii) a total storage capacity of 200 gallons per connection;

(iii) two or more pumps that have a total capacity of 2.0 gpm per connection or that have a total capacity of at least 1,000 gpm and the ability to meet peak hourly demands with the largest pump out of service, whichever is less, at each pump station or pressure plane. For systems which provide an elevated storage capacity of 200 gallons per connection, two service pumps with a minimum combined capacity of 0.6 gpm per connection are required at each pump station or pressure plane. If only wells and elevated storage are provided, service pumps are not required;

(iv) an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection. If pressure tanks are used, a maximum capacity of 30,000 gallons is sufficient for up to 2,500 connections. An elevated storage capacity of 100 gallons per connection is required for systems with more than 2,500 connections. Alternate methods of pressure maintenance may be proposed and will be approved if the criteria contained in subsection (g)(5) of this section are met; and

(v) emergency power for systems which serve more than 250 connections and do not meet the elevated storage requirement. Sufficient emergency power must be provided to deliver a minimum of 0.35 gpm per connection to the distribution system in the event of the loss of normal power supply. Alternately, an emergency interconnection can be provided with another public water system that has emergency power and is able to supply at least 0.35 gpm for each connection in the combined system. Emergency power facilities in systems serving 1,000 connections or greater must be serviced and maintained in accordance with level 2 maintenance requirements contained in the current National Fire Protection Association (NFPA) 110 standards. Although not required, compliance with NFPA 110 standards is highly recommended for systems serving less than 1,000 connections. Logs of all emergency power use and maintenance must be maintained and kept on file for a period of not less than three years. These records must be made available, upon request, for executive director review.

(E) Mobile home parks with a density of eight or more units per acre and apartment complexes which supply fewer than 100 connections without ground storage must meet the following requirements:

(i) a well capacity of 1.0 gpm per connection; and

(ii) a pressure tank capacity of 50 gallons per connection with a maximum of 2,500 gallons required.

(F) Mobile home parks and apartment complexes which supply 100 connections or greater, or fewer than 100 connections and utilize ground storage must meet the following requirements:

(i) a well capacity of 0.6 gpm per connection. Systems with 250 or more connections must have either two wells or an approved interconnection which is capable of supplying at least 0.35 gpm for each connection in the combined system;

(ii) a total storage of 200 gallons per connection;

(iii) at least two service pumps with a total capacity of 2.0 gpm per connection; and

(iv) a pressure tank capacity of 20 gallons per connection.

(2) Surface water supplies must meet the following requirements:

(A) a raw water pump capacity of 0.6 gpm per connection with the largest pump out of service;

(B) a treatment plant capacity of 0.6 gpm per connection under normal rated design flow;

(C) transfer pumps (where applicable) with a capacity of 0.6 gpm per connection with the largest pump out of service;

(D) a covered clearwell storage capacity at the treatment plant of 50 gallons per connection or, for systems serving more than 250 connections, 5.0% of daily plant capacity;

(E) a total storage capacity of 200 gallons per connection;

(F) a service pump capacity that provides each pump station or pressure plane with two or more pumps that have a total capacity of 2.0 gpm per connection or that have a total capacity of at least 1,000 gpm and the ability to meet peak hourly demands with the largest pump out of service, whichever is less. For systems which provide an elevated storage capacity of 200 gallons per connection, two service pumps with a minimum combined capacity of 0.6 gpm per connection are required at each pump station or pressure plane;

(G) an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection. If pressure tanks are used, a maximum capacity of 30,000 gallons is sufficient for systems of up to 2,500 connections. An elevated storage capacity of 100 gallons per connection is required for systems with more than 2,500 connections. Alternate methods of pressure maintenance may be proposed and will be approved if the criteria contained in subsection (g)(5) of this section are met; and

(H) emergency power for systems which serve more than 250 connections and do not meet the elevated storage requirement. Sufficient emergency power must be provided to deliver a minimum of 0.35 gpm per connection to the distribution system in the event of the loss of normal power supply. Alternately, an emergency interconnection can be provided with another public water system that has emergency power and is able to supply at least 0.35 gpm for each connection in the combined system. Emergency power facilities in systems serving 1,000 connections or greater must be serviced and maintained in accordance with level 2 maintenance requirements contained in the current NFPA 110 standards. Although not required, compliance with NFPA 110 standards is highly recommended for systems serving less than 1,000 connections. Logs of all emergency power use and maintenance must be maintained and kept on file for a period of not less than three years. These records must be made available, upon request, for executive director review.

(3) Any community public water system that is an affected utility shall have an emergency preparedness plan approved by the executive director and must meet the requirements for emergency operations contained in subsection (h) of this section. This includes any affected utility that provides 100 gallons of elevated storage capacity per connection.

(c) Noncommunity water systems serving transient accommodation units. The following water capacity requirements apply to noncommunity water systems serving accommodation units such as hotel rooms, motel rooms, travel trailer spaces, campsites, and similar accommodations.

(1) Groundwater supplies must meet the following requirements.

(A) If fewer than 100 accommodation units without ground storage, the system must meet the following requirements:

(i) a well capacity of 1.0 gpm per unit; and

(ii) a pressure tank capacity of ten gallons per unit with a minimum of 220 gallons.

(B) For systems serving fewer than 100 accommodation units with ground storage or serving 100 or more accommodation units, the system must meet the following requirements:

(i) a well capacity of 0.6 gpm per unit;

(ii) a ground storage capacity of 35 gallons per unit;

(iii) two or more service pumps which have a total capacity of 1.0 gpm per unit; and

(iv) a pressure tank capacity of ten gallons per unit.

(2) Surface water supplies, regardless of size, must meet the following requirements:

(A) a raw water pump capacity of 0.6 gpm per unit with the largest pump out of service;

(B) a treatment plant capacity of 0.6 gpm per unit;

(C) a transfer pump capacity (where applicable) of 0.6 gpm per unit with the largest pump out of service;

(D) a ground storage capacity of 35 gallons per unit with a minimum of 1,000 gallons as clearwell capacity;

(E) two or more service pumps with a total capacity of 1.0 gpm per unit; and

(F) a pressure tank capacity of ten gallons per unit with a minimum requirement of 220 gallons.

(3) A noncommunity public water system that is an affected utility shall meet the requirements of subsection (h) of this section.

(d) Noncommunity water systems serving other than transient accommodation units.

(1) The following table is applicable to paragraphs (2) and (3) of this subsection and shall be used to determine the maximum daily demand for the various types of facilities listed.
Figure: 30 TAC §290.45(d)(1) (No change.)

(2) Groundwater supplies must meet the following requirements.

(A) Subject to the requirements of subparagraph (B) of this paragraph, if fewer than 300 persons per day are served, the system must meet the following requirements:

(i) a well capacity which meets or exceeds the maximum daily demand of the system during the hours of operation; and

(ii) a minimum pressure tank capacity of 220 gallons with additional capacity, if necessary, based on a sanitary survey conducted by the executive director.

(B) Systems which serve 300 or more persons per day or serve fewer than 300 persons per day and provide ground storage must meet the following requirements:

(i) a well capacity which meets or exceeds the maximum daily demand;

(ii) a ground storage capacity which is equal to 50% of the maximum daily demand;

(iii) if the maximum daily demand is less than 15 gpm, at least one service pump with a capacity of three times the maximum daily demand;

(iv) if the maximum daily demand is 15 gpm or more, at least two service pumps with a total capacity of three times the maximum daily demand; and

(v) a minimum pressure tank capacity of 220 gallons with additional capacity, if necessary, based on a sanitary survey conducted by the executive director.

(3) Each surface water supply or groundwater supply that is under the direct influence of surface water, regardless of size, must meet the following requirements:

(A) a raw water pump capacity which meets or exceeds the maximum daily demand of the system with the largest pump out of service;

(B) a treatment plant capacity which meets or exceeds the system's maximum daily demand;

(C) a transfer pump capacity (where applicable) sufficient to meet the maximum daily demand with the largest pump out of service;

(D) a clearwell capacity which is equal to 50% of the maximum daily demand;

(E) two or more service pumps with a total capacity of three times the maximum daily demand; and

(F) a minimum pressure tank capacity of 220 gallons with additional capacity, if necessary, based on a sanitary survey conducted by the executive director.

(4) A noncommunity public water system that is an affected utility shall meet the requirements of subsection (h) of this section.

(e) Water wholesalers. The following additional requirements apply to systems which supply wholesale treated water to other public water supplies.

(1) All wholesalers must provide enough production, treatment, and service pumping capacity to meet or exceed the combined maximum daily commitments specified in their various contractual obligations.

(2) For wholesale water suppliers, minimum water system capacity requirements shall be determined by calculating the requirements based upon the number of retail customer service connections of that wholesale water supplier, if any, and adding that amount to the maximum amount of water obligated or pledged under all wholesale contracts.

(3) Emergency power is required for each portion of the system which supplies more than 250 connections under direct pressure and does not provide an elevated storage capacity of at least 100 gallons per connection. If emergency power is required, it must be sufficient to deliver 20% of the minimum required service pump capacity in the event of the loss of normal power supply. When the wholesaler provides water through an air gap into the purchaser's storage facilities it will be the purchaser's responsibility to meet all minimum water system capacity requirements including emergency power.

(4) A wholesaler that is an affected utility must meet the requirements specified in subsection (h) of this section.

(f) Purchased water systems. The following requirements apply only to systems which purchase treated water to meet all or part of their production, storage, service pump, or pressure maintenance capacity requirements.

(1) The water purchase contract must be available to the executive director in order that production, storage, service pump, or pressure maintenance capacity may be properly evaluated. For purposes of this section, a contract may be defined as a signed written document of specific terms agreeable to the water purchaser and the water wholesaler, or in its absence, a memorandum or letter of understanding between the water purchaser and the water wholesaler.

(2) The contract shall authorize the purchase of enough water to meet the monthly or annual needs of the purchaser.

(3) The contract shall also establish the maximum rate at which water may be drafted on a daily and hourly basis. In the absence of specific maximum daily or maximum hourly rates in the contract, a uniform purchase rate for the contract period will be used.

(4) The maximum authorized daily purchase rate specified in the contract, or a uniform purchase rate in the absence of a specified daily purchase rate, plus the actual production capacity of the system must be at least 0.6 gpm per connection.

(5) For systems which purchase water under direct pressure, the maximum hourly purchase authorized by the contract plus the

actual service pump capacity of the system must be at least 2.0 gpm per connection or provide at least 1,000 gpm and be able to meet peak hourly demands, whichever is less.

(6) The purchaser is responsible for meeting all production requirements. If additional capacity to meet increased demands cannot be attained from the wholesaler through a new or amended contract, additional capacity must be obtained from water purchase contracts with other entities, new wells, or surface water treatment facilities. However, if the water purchase contract prohibits the purchaser from securing water from sources other than the wholesaler, the wholesaler is responsible for meeting all production requirements.

(7) All other minimum capacity requirements specified in this section shall apply.

(g) Alternative capacity requirements. Public water systems may request approval to meet alternative capacity requirements in lieu of the minimum capacity requirements specified in this section. Any water system requesting to use an alternative capacity requirement must demonstrate to the satisfaction of the executive director that approving the request will not compromise the public health or result in a degradation of service or water quality. Alternative capacity requirements are unavailable for groundwater systems serving fewer than 50 connections without total storage as specified in subsection (b)(1) of this section or for noncommunity water systems as specified in subsections (c) and (d) of this section.

(1) Alternative capacity requirements for public water systems may be granted upon request to and approval by the executive director. The request to use an alternative capacity requirement must include:

(A) a detailed inventory of the major production, pressurization, and storage facilities utilized by the system;

(B) records kept by the water system that document the daily production of the system. The period reviewed shall not be less than three years. The applicant may not use a calculated peak daily demand;

(C) data acquired during the last drought period in the region, if required by the executive director;

(D) the actual number of active connections for each month during the three years of production data;

(E) description of any unusual demands on the system such as fire flows or major main breaks that will invalidate unusual peak demands experienced in the study period;

(F) any other relevant data needed to determine that the proposed alternative capacity requirement will provide at least 35 psi in the public water system except during line repair or during fire fighting when it cannot be less than 20 psi; and

(G) a copy of all data relied upon for making the proposed determination.

(2) Alternative capacity requirements for existing public water systems must be based upon the maximum daily demand for the system, unless the request is submitted by a licensed professional engineer in accordance with the requirements of paragraph (3) of this subsection. The maximum daily demand must be determined based upon the daily usage data contained in monthly operating reports for the system during a 36 consecutive month period. The 36 consecutive month period must end within 90 days of the date of submission to ensure the data is as current as possible.

(A) Maximum daily demand is the greatest number of gallons, including groundwater, surface water, and purchased water delivered by the system during any single day during the review period. Maximum daily demand excludes unusual demands on the system such as fire flows or major main breaks.

(B) For the purpose of calculating alternative capacity requirements, an equivalency ratio must be established. This equivalency ratio must be calculated by multiplying the maximum daily demand, expressed in gpm per connection, by a fixed safety factor and dividing the result by 0.6 gpm per connection. The safety factor shall be 1.15 unless it is documented that the existing system capacity is adequate for the next five years. In this case, the safety factor may be reduced to 1.05. The conditions in §291.93(3) of this title (relating to Adequacy of Water Utility Service) concerning the 85% rule shall continue to apply to public water systems that are also retail public utilities.

(C) To calculate the alternative capacity requirements, the equivalency ratio must be multiplied by the appropriate minimum capacity requirements specified in subsection (b) of this section. Standard rounding methods are used to round calculated alternative production capacity requirement values to the nearest one-hundredth.

(3) Alternative capacity requirements which are proposed and submitted by licensed professional engineers for review are subject to the following additional requirements.

(A) A signed and sealed statement by the licensed professional engineer must be provided which certifies that the proposed alternative capacity requirements have been determined in accordance with the requirements of this subsection.

(B) If the system is new or at least 36 consecutive months of data is not available, maximum daily demand may be based upon at least 36 consecutive months of data from a comparable public water system. A licensed professional engineer must certify that the data from another public water system is comparable based on consideration of the following factors: prevailing land use patterns (rural versus urban); number of connections; density of service populations; fire flow obligations; and socio-economic, climatic, geographic, and topographic considerations as well as other factors as may be relevant. The comparable public water system shall not exhibit any of the conditions listed in paragraph (6)(A) of this subsection.

(4) The executive director shall consider requests for alternative capacity requirements in accordance with the following requirements.

(A) For those requests submitted under the seal of a licensed professional engineer, the executive director must mail written acceptance or denial of the proposed alternative capacity requirements to the public water system within 90 days from the date of submission. If the executive director fails to mail written notification within 90 days, the alternative capacity requirements submitted by a licensed professional engineer automatically become the alternative capacity requirements for the public water system.

(B) If the executive director denies the request:

(i) the executive director shall mail written notice to the public water system identifying the specific reason or reasons for denial and allow 45 days for the public water system to respond to the reason(s) for denial;

(ii) the denial is final if no response from the public water system is received within 45 days of the written notice being mailed; and

(iii) the executive director must mail a final written approval or denial within 60 days from the receipt of any response timely submitted by the public water system.

(5) Although elevated storage is the preferred method of pressure maintenance for systems of over 2,500 connections, it is recognized that local conditions may dictate the use of alternate methods utilizing hydropneumatic tanks and on-site emergency power equipment. Alternative capacity requirements to the elevated storage requirements may be obtained based on request to and approval by the executive director. Special conditions apply to systems qualifying for an elevated storage alternative capacity requirement.

(A) The system must submit documentation sufficient to assure that the alternate method of pressure maintenance is capable of providing a safe and uninterrupted supply of water under pressure to the distribution system during all demand conditions.

(i) A signed and sealed statement by a licensed professional engineer must be provided which certifies that the pressure maintenance facilities are sized, designed, and capable of providing a minimum pressure of at least 35 psi at all points within the distribution network at flow rates of 1.5 gpm per connection or greater. In addition, the engineer must certify that the emergency power facilities are capable of providing the greater of the average daily demand or 0.35 gpm per connection while maintaining distribution pressures of at least 35 psi, and that emergency power facilities powering production and treatment facilities are capable of supplying at least 0.35 gpm per connection to storage.

(ii) The system's licensed professional engineer must conduct a hydraulic analysis of the system under peak conditions. This must include an analysis of the time lag between the loss of the normal power supply and the commencement of emergency power as well as the minimum pressure that will be maintained within the distribution system during this time lag. In no case shall this minimum pressure within the distribution system be less than 20 psi. The results of this analysis must be submitted to the executive director for review.

(iii) For existing systems, the system's licensed professional engineer must provide continuous pressure chart recordings of distribution pressures maintained during past power failures, if available. The period reviewed shall not be less than three years.

(iv) A public water system that is an affected utility must conduct the modeling requirements contained in clauses (i) - (iii) of this subparagraph using the requirements specified in subsection (h) of this section.

(B) Emergency power facilities must be maintained and provided with necessary appurtenances to assure immediate and dependable operation in case of normal power interruption. A public water system that is an affected utility must meet the requirements specified in subsection (h) of this section.

(i) The facilities must be serviced and maintained in accordance with level 2 maintenance requirements contained in the current NFPA 110 standards and the manufacturers' recommendations.

(ii) The switching gear must be capable of bringing the emergency power generating equipment on-line during a power interruption such that the pressure in the distribution network does not fall below 20 psi at any time.

(iii) The minimum on-site fuel storage capacity shall be determined by the fuel demand of the emergency power facilities and the frequency of fuel delivery. An amount of fuel equal to that required to operate the facilities under-load for a period of at least eight hours must always be maintained on site.

(iv) Residential rated mufflers or other means of effective noise suppression must be provided on each emergency power motor.

(C) Battery-powered or uninterrupted power supply pressure monitors and chart recorders which are configured to activate immediately upon loss of normal power must be provided for pressure maintenance facilities. These records must be kept for a minimum of three years and made available for review by the executive director. Records must include chart recordings of all power interruptions including interruptions due to periodic emergency power under-load testing and maintenance.

(D) An emergency response plan must be submitted detailing procedures to be followed and individuals to be contacted in the event of loss of normal power supply.

(6) Any alternative capacity requirement granted under this subsection is subject to review and revocation or revision by the executive director. If permission to use an alternative capacity requirement is revoked, the public water system must meet the applicable minimum capacity requirements of this section.

(A) The following conditions, if attributable to the alternative capacity requirements, may constitute grounds for revocation or revision of established alternative capacity requirements or for denial of new requests, if the condition occurred within the last 36 months:

(i) documented pressure below 35 psi at any time not related to line repair, except during fire fighting when it cannot be less than 20 psi;

(ii) water outages due to high water usage;

(iii) mandatory water rationing due to high customer demand or overtaxed water production or supply facilities;

(iv) failure to meet a minimum capacity requirement or an established alternative capacity requirement;

(v) changes in water supply conditions or usage patterns which create a potential threat to public health; or

(vi) any other condition where the executive director finds that the alternative capacity requirement has compromised the public health or resulted in a degradation of service or water quality.

(B) If the executive director finds any of the conditions specified in subparagraph (A) of this paragraph, the process for revocation or revision of an alternative capacity requirement shall be as follows, unless the executive director finds that failure of the service or other threat to public health and safety is imminent under subparagraph (C) of this paragraph.

(i) The executive director must mail the public drinking water system written notice of the executive director's intent to revoke or revise an alternative capacity requirement identifying the specific reason(s) for the proposed action.

(ii) The public water system has 30 days from the date the written notice is mailed to respond to the proposed action.

(iii) The public water system has 30 days from the date the written notice is mailed to request a meeting with the agency's public drinking water program personnel to review the proposal. If requested, such a meeting must occur within 45 days of the date the written notice is mailed.

(iv) After considering any response from or after any requested meeting with the public drinking water system, the executive director must mail written notification to the public drinking water system of the executive director's final decision to continue, revoke, or revise an alternative capacity requirement identifying the specific reason(s) for the decision.

(C) If the executive director finds that failure of the service or other threat to public health and safety is imminent, the executive director may issue written notification of the executive director's final decision to revoke or revise an alternative capacity requirement at any time.

(h) Affected utilities. This subsection applies to all affected utilities and is in addition to any other requirements pertaining to emergency power requirements found in this subchapter.

(1) Affected utilities must provide one of the following options of sufficient power to meet the capacity requirements of paragraph (1) or (2) of this subsection, whichever is applicable, and in accordance with the affected utility's approved emergency preparedness plan:

(A) The maintenance of automatically starting auxiliary generators;

(B) The sharing of auxiliary generator capacity with one or more affected utilities;

(C) The negotiation of leasing and contracting agreements, including emergency mutual aid agreements with other retail public utilities, exempt utilities, or providers, or conveyors of potable or raw water service, if the agreements provide for coordination with the division of emergency management in the governor's office;

(D) The use of portable generators capable of serving multiple facilities equipped with quick-connect systems;

(E) The use of on-site electrical generation or electrical distributed generation facilities;

(F) Hardening of the electric transmission and electric distribution system against damage from natural disasters during an extended power outage;

(G) For existing facilities, the maintenance of direct engine or right angle drives; or

(H) Any other alternative determined by the executive director to be acceptable.

(2) Each affected utility that supplies, provides, or conveys surface water to wholesale customers shall install and maintain automatically starting auxiliary generators or distributive generation facilities for each raw water intake pump station, water treatment plant, pump station, and pressure facility necessary to provide water to its wholesale customers.

(3) Emergency generators used as part of an approved emergency preparedness plan must be maintained, tested, and operated in accordance with the manufacturer's specifications.

(4) An affected utility may adopt and is encouraged to enforce limitations on water use while the utility is providing emergency operations.

(5) As soon as safe and practicable following the occurrence of a natural disaster, an affected utility must operate in accordance with its approved emergency preparedness plan, which may include using elevated storage. An affected utility may meet the requirements of Texas Water Code, §13.1395, including having a currently approved emergency preparedness plan, in lieu of any other rules regarding elevated storage requirements, provided that, under normal operating conditions, the affected utility continues to meet the pressure requirements of §290.46(r) of this title (relating to Minimum Acceptable Operating Practices for Public Drinking Water Systems) and the production, treatment, total storage and service pump capacity requirements of this subchapter.

(6) An affected utility must maintain on-site, or make readily available during emergency operations, an amount of fuel necessary to operate any required emergency power equipment necessary to maintain emergency operations.

§290.47. Appendices.

(a) Appendix A. Recognition as a Superior or Approved Public Water System.
Figure: 30 TAC §290.47(a) (No change.)

(b) Appendix B. Sample Service Agreement.
Figure: 30 TAC §290.47(b) (No change.)

(c) Appendix C. Sample Sanitary Control Easement Document for a Public Water Well.
Figure: 30 TAC §290.47(c) (No change.)

(d) Appendix D. Customer Service Inspection Certification.
Figure: 30 TAC §290.47(d) (No change.)

(e) Appendix E. Boil Water Notification.
Figure: 30 TAC §290.47(e) (No change.)

(f) Appendix F. Sample Backflow Prevention Assembly Test and Maintenance Report.
Figure: 30 TAC §290.47(f) (No change.)

(g) Appendix G. Operator and/or Employment Notice.
Figure: 30 TAC §290.47(g) (No change.)

(h) Appendix H. Special Precautions.
Figure: 30 TAC §290.47(h) (No change.)

(i) Appendix I. Assessment of Hazard and Selection of Assemblies.
Figure: 30 TAC §290.47(i) (No change.)

(j) Appendix J. Emergency Preparedness Plan Template.
Figure: 30 TAC §290.47(j)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0177

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CHAPTER 291. UTILITY REGULATIONS
SUBCHAPTER L. STANDARDS OF EMERGENCY OPERATIONS

30 TAC §§291.160 - 291.162

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§291.160 - 291.162.

Section 291.161 and §291.162 are adopted with changes to the proposed text as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5882). Section 291.160 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2009, the 81st Legislature passed Senate Bill (SB) 361, relating to the requirement that certain water service providers ensure emergency operations during an extended power outage. SB 361 amends Texas Water Code (TWC), Chapter 13, by adding §13.1395, Standards of Emergency Operation, and §13.1396, Coordination of Emergency Operations. TWC, §13.1395, requires that affected utilities prepare an emergency preparedness plan (EPP) that shows that the utility has the ability to provide emergency operations and submit that plan to the commission. TWC, §13.1396, outlines the coordination efforts among an affected utility, its county judge, and its office of emergency management as well as each retail electric provider that sells electric power to an affected utility and each electric utility that provides transmission and distribution service to an affected utility.

TWC, §13.1395, provides that a water service provider may use the commission's template to develop its EPP and must include one of eight means for maintaining 35 pounds per square inch (psi) of pressure during power outages that last longer than 24 hours as soon as it is safe and practicable following natural disasters. The statute also specifies that the commission has 90 days once the plan is submitted to review the plan and either approve it or recommend changes. Once the commission approves the plan, the water service provider must operate in accordance with its plan and maintain any generators in accordance with manufacturer's specifications. TWC, §13.1395, also specifies that the commission will conduct inspections to ensure compliance and that waivers to these requirements are available under certain circumstances. Additionally, these additions to the TWC made by SB 361 give the commission the authority to regulate water service providers that have not previously been regulated by the TCEQ.

SB 361, Section 2(c), requires that each affected utility submit to the commission its EPP required by TWC, §13.1395, no later than March 1, 2010.

In its proposal the commission solicited comments on the appropriate sources and year of population data to determine the counties to which this rule applies. Further, the commission solicited comments on which counties adjacent to Harris County would be subject to this adopted rule. As discussed in the RESPONSE TO COMMENT section of this preamble, the commission received comments on the appropriate sources and year of data population as well as which counties adjacent to Harris County would be subject to this rulemaking from Lloyd Gosselink on behalf of San Jacinto River Authority (SJRA) and Schwartz, Page & Harding, L.L.P., (SPH) on behalf of its clients.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts amendments to 30 TAC Chapter 290, Public Drinking Water.

SECTION BY SECTION DISCUSSION

The commission adds new Subchapter L, Standards of Emergency Operations, including §§291.160 - 291.162, to include the requirements to implement TWC, §13.1395, as amended by SB 361.

The commission adopts new §291.160, Purpose, to give the purpose of the standards of emergency operations and to inform public water systems that they must comply with requirements for emergency operation in Chapter 290, Subchapter D.

The commission adopts new §291.161, Definitions, to add definitions necessary to implement TWC, §13.1395, as amended by SB 361. The commission adopts the definition of "affected utility" in §291.161(1) as providers or conveyors of potable or raw water service which furnish more than one customer and are located in counties with specific population and location criteria. The commission adopts the definition of "emergency operations" in §291.161(2) as maintaining pressure during 24-hour or longer power outages. The commission adopts the definition of "extended power outage" in §291.161(3) as a power outage lasting more than 24 hours. In response to comment, the commission adopts the definition of "population" in §291.161(4) as the population according to the most recent federal decennial census, which is a change to the proposed text.

The commission adopts new §291.162, Emergency Operation of an Affected Utility, to define the specific requirements of emergency operation plans including the contents, submission, implementation, revision, enforcement, waivers, and extensions. In response to comments, the commission adopts new §291.162(a) with changes to the proposed text to: 1) remove the proposed flow requirements included in the proposed text as the commission decided that the flow rate for maintaining 35 psi would be better defined in its shell form, TCEQ Form Number 20536; and 2) to require an affected utility to adopt and submit an EPP to the executive director. The commission adopts new §291.162(b) to require the executive director to review the plans within 90 days of receipt. The commission adopts new §291.162(c) to list the eight options in TWC, §13.1395(c). The commission adopts new §291.162(d) to require that providers of surface water to wholesale customers include in their EPP provisions for the actual installation and maintenance of automatically starting auxiliary generators or distributive generation facilities for each facility necessary to provide water to its wholesale customers. The commission adopts new §291.162(e) to allow the affected utility to use the plan template in §290.47(j), Appendix J. The commission adopts new §291.162(f) to require that the emergency generator be operated and maintained according to the manufacturer's specifications. The commission adopts new §291.162(g) to allow the executive director the ability to grant waivers for significant financial burden. The commission adopts new §291.162(h) to allow the affected utility to adopt and enforce limitations on water use during emergency operations. The commission adopts new §291.162(i) to allow the information submitted under this subchapter to remain confidential as allowed by TWC, §13.1395(1). The commission adopts new §291.162(j) to require EPPs for affected utilities that exist on December 1, 2009 to be submitted to the executive director no later than March 1, 2010. The commission adopts new §291.162(k) to require affected utilities created after the effective date of this rule to have an approved EPP before providing water to customers. The commission adopts new §291.162(l) to allow an affected utility to file a written request for an extension with the executive director. The commission adopts new §291.162(m) to allow the executive director to require a revised EPP under certain circumstances. These new provisions are required to implement TWC, §13.1395, as amended by SB 361.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific

intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to require certain water utilities, providers, and conveyors to have EPPs for maintaining water pressure following a disruption in service caused by a natural disaster. These rules are not required by federal regulations.

This rulemaking sets out to clarify who the affected utilities are and how they may comply with the requirements. The adopted rules require water utilities, providers, and conveyors of potable or raw water to submit for commission approval EPPs demonstrating how they can maintain 35 psi following a natural disaster that causes an extended power outage, while providing for waivers for those who can show that the requirement would result in a significant financial burden to its customers.

Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the adopted rules will be significant with respect to the economy as a whole; therefore, the adopted rules will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for treatment of water used in public water systems and is specifically required by state law; 2) does not exceed the requirements of state law under TWC, Chapter 13, Subchapter E; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on treatment of water used in public water systems, but rather is adopted to be consistent with state law in order to ensure that emergency operations of water systems are commenced as soon as safe and practicable following the occurrence of a natural disaster; and 4) is not adopted solely under the general powers of the agency, but rather specifically under TWC, §13.041, which allows the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to implement certain recently enacted legislation relating to the emergency preparedness of affected utilities. The adopted rules require an "affected utility" that is located within a county with a population of 3.3 million or more, or a county with a population of 400,000 or more that is adjacent to a county with a population of 3.3 million or more, to comply with emergency operations (SB 361). This rulemaking substantially advances this stated purpose by making the commission's rules consistent with the new statutory language. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this action does not affect private real property.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict the owner's right to property. More specifically, these rules implement legislation addressing the adoption of EPPs by "affected utilities" (SB 361). These provisions do not impose any burdens or restrictions on private real property. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The specific intent of the adopted rules is to amend the rules to be consistent with recent legislative enactments (SB 361) to address the submission and review of EPPs by affected utilities, which is a procedural mechanism and is administrative in nature. Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held two public hearings for this rule on September 21, 2009 and September 22, 2009 in Harris County, Texas. The comment period closed September 28, 2009.

At the public hearings the commission received oral comments from Representative Bill Callegari; Bacon and Wallace, L.L.P., on behalf of its clients (Bacon & Wallace); the City of Baytown (Baytown); the City of Houston (Houston); Costello Engineers (Costello); Jacobs Engineering (Jacobs Engineering); Roy Moffitt Customized Fuel (Roy Moffitt); and Patrick F. Timmons, Jr., attorney at law, on behalf of HMW Special Utility District (HMW).

The commission received written comments from Allen Boone Humphries Robinson, L.L.P. (ABHR); Baytown; the City of Richmond (Richmond); the City of Sugar Land (Sugar Land); Dow Chemical Company (Dow); Houston; HMW; Jones and Carter (J&C); North Harris County Regional Water Authority (NHCRWA); Pate Engineers, Inc. (Pate); Roy Patricia Investments (RPI); SJRA: Southwest Water Company (Southwest); and SPH.

Richmond did not support the rulemaking. All other commenters generally supported the rulemaking; however, some commenters provided suggested language as discussed in the RESPONSE TO COMMENTS section.

RESPONSE TO COMMENTS

During his oral comments, Representative Callegari stated that the intent of the bill was to include Harris and Fort Bend Counties, and not to affect Montgomery County. He stated that the legislative process did not allow representatives to name particular counties that a bill affects; therefore, the bill was drafted to include these two counties based on population brackets. The legislative counsel's data showed that the population for Montgomery County was less than 400,000 at the time the bill was drafted. The bill was not intended to apply to Montgomery County, even if the population exceeded the threshold in the future. He stated this would be corrected in future legislation. Jacobs Engineering asked why the bill only affected Fort Bend and Harris Counties. SJRA and SPH commented that the proposed rules' population figures should be based on the most recent federal decennial census, which is the Year 2000 Census. SJRA and SPH further noted that the Code Construction Act defines "population" to mean "the population shown by the most recent federal decennial census" (see Texas Government Code, §311.005(3)). SJRA requested that the commission clarify that the term "population" is to be interpreted in accordance with the Code Construction Act. Finally, SJRA noted that SB 361 applies to Harris County, but not to any other county, because, pursuant to the Year 2000 Census, no other county adjacent to Harris County had a population of "400,000 or more." SPH recommended that the commission remove Fort Bend County from its proposed rules until such time as that county officially crosses the population threshold contained in SB 361.

The commission aggress with SJRA and SPH's comment regarding the use of the term "population" as it applies to SB 361 because the legislation did not specifically require a different definition of "population." Therefore, absent express statutory language, the commission must follow the definition contained in the Code Construction Act. Based on the Year 2000 Census this rule applies only to Harris County and not to any other county, as no county adjacent to Harris County had a population of at least 400,000 in the Year 2000 Census. In response to comment, the commission added a definition for the term "population" in §291.161. It is the intent of the commission that this definition apply to the implementation of TWC, §13.1395 and not apply to "population" as that word is used elsewhere in Chapters 290 and 291, other than Chapter 291, Subchapter L, Standards of Emergency Operations.

HMW requested clarification on whether the commission will have a mechanism to notify affected utilities in Montgomery County of when they become subject to these regulations.

The commission responds that counties can identify themselves as being subject to this rule by consulting the most recent federal decennial census data. No changes were made in response to this comment.

HMW submitted a written comment on what mechanism the TCEQ will use to determine the future dates on which Montgomery County, and all other counties adjacent to Harris County, will become subject to the new statute's implementing rules. ABHR commented that the rule should be revised to clarify that water systems that become affected utilities after December 1, 2009 have a review time of 90 calendar days following the submission of its EPP.

As future decennial data become available, systems in adjacent counties will automatically fall under the requirements of these rules, and there will be a 90-day review period following submission of an EPP to the commission. Section 291.162(k) requires affected utilities established after the effective date of this rule to have EPPs approved and implemented prior to beginning construction; further, §291.162(b) includes a 90-day review time frame for water providers that become affected utilities after December 1, 2009. Existing water providers that become affected utilities due to population changes are not addressed within SB 361. At such time that the legislature clarifies future applicability parameters, the commission will respond accordingly. The commission made no change in response to this comment as Chapters 290 and 291 already include a 90-day review time frame for water providers that become affected utilities after December 1, 2009.

Representative Callegari stated that the intent of SB 361 was that water systems in other counties that provide water to Harris County were affected utilities. Baytown wanted to know whether its Chambers County station, which provides water to Harris County, was subject to SB 361. Baytown further commented that the proposed rules did not appear to apply to raw water sources outside of Harris and Fort Bend Counties. Baytown commented that without this supply, the requirement of emergency power within those counties was essentially useless, because systems within Harris and Fort Bend Counties would have no water to treat. J&C requested clarification on whether a water provider located outside the applicable counties and providing service to those counties is considered an affected utility. ABHR commented that it supported Representative Callegari's position that SB 361 applies to water providers outside of Harris County providing water service to customers within those counties. ABHR requested the commission's clarification that the rules would apply only to such a system's facilities serving customers in Harris and Fort Bend Counties, but not to its entire system.

The commission responds that the rule only applies within counties that meet the population brackets set out in the statute and as defined by the Code Construction Act, Texas Government Code, §311.005(3). Based on the Year 2000 Census this rule applies only to Harris County and not to any other county, as no county adjacent to Harris County had a population of at least 400,000 in the Year 2000 Census. The commission's rule is intended to apply to affected utilities whose facilities and more than one customer are located within the bracketed counties. The adopted rules require water service providers that meet the definition of an affected utility to submit an EPP to the commission. Water service providers that are located in counties that do not fall within the population brackets are not required to submit EPPs under the provisions of SB 361. The commission made no changes in response to this comment.

Dow commented that the definition of affected utility is ambiguous and should be clarified. Dow further commented that the def-

inition of retail public utility and customer are defined in §291.1, but these and other terms are not referenced in the definition of affected utility found in §290.38. Dow recommended that the definition exempt noncommunity water systems from the amendments, as there is no impact to the community.

The commission responds that the definition of affected utility was taken from the language contained in SB 361. SB 361 affects noncommunity systems, and therefore, the commission does not have the authority to exempt those systems from this bill's requirements. In addition, the commission does not have the authority to revise the statutory language. However, one of the eight options in the EPP allows an affected utility to use any other alternative that is determined by the commission to be acceptable. In response to this comment, the commission amended §290.38(1) to incorporate by reference the Chapter 291 definitions not found elsewhere in Chapter 290 and renumbered the subsequent paragraphs accordingly.

SJRA requested clarification on whether the rule applies to wholesale raw water providers. Further, SJRA commented that the fiscal note did not discuss the financial impact of this rule on wholesale raw water providers. SJRA commented that the proposed rules should be defined to apply only to public water systems as defined in Subchapter D to include only those systems providing potable water services and the proposed rules under Chapter 291 should be interpreted to apply only to water utilities as defined in Chapter 291 to include only utilities providing potable water.

The commission responds that the language contained in SB 361, which amended TWC, §13.1395(a)(1) to define an affected utility as "a retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water to more than one customer," included raw water service in its definition. The intent of SB 361 was to regulate, among others, wholesale raw water providers to ensure that retail public utilities have sufficient water supplies during a natural disaster to ensure service is provided during emergency operations. The commission concurs that it did not specifically address impacts to wholesale raw water providers in its fiscal note. According to the water utilities database (WUD) (the commission's database of record for utilities, districts, and public water systems), no wholesale raw water providers were identified in Harris County. However, the commission has since conducted a fiscal analysis of the rule's impact to wholesale raw water providers and the amended fiscal note provided, in part as follows: "The proposed rules are not expected to have a significant fiscal impact on governmental entities that own or operate public water systems, but governmental entities that are raw water wholesalers could see costs increase significantly as a result of the proposed rules . . . The proposed rules will require local governments in Harris County that wholesale raw water to more than one customer to prepare an EPP ensuring operation of their water systems at 35 psi during an extended power outage by one of the following options: automatically starting auxiliary generators or on-site electrical generation . . . If . . . governmental entities are able to enter into a mutual aid agreement, they should not experience any significant cost increases as a result of the proposed rules . . . If these raw water wholesalers purchase generators to comply with EPP provisions, each of their pump stations will need to be evaluated separately to determine specific generator requirements. Staff estimates that the purchase and installation of emergency generators will cost these governmental entities approximately $25,000 per million gallons per day (MGD) of raw water delivered. The average daily production of these governmental entities may be as much as 500 MGD from a single pump station, with a maximum pumping capacity of one billion gallons per day. At 500 MGD, raw water wholesalers could spend at a minimum $12.5 million to purchase and install generators, which would have a significant fiscal impact on their operations . . . Consumers of public water utilities or raw water could see rates increase, which may be significant if raw water wholesalers have to recoup their generator costs. In return, consumers are expected to experience more rapid deployment of water services in emergency situations . . . In general no significant fiscal impacts are anticipated for businesses or individuals as a result of the proposed rules unless they purchase water from an affected raw water wholesaler. Those that purchase water from a raw water wholesaler that must install emergency generators could see a significant increase in costs." No change was made in response to this comment.

SJRA commented that failure to include a fiscal note on wholesale raw water providers is a violation of the Administrative Procedure Act (see Texas Government Code, §2001.024(4)).

The commission respectfully disagrees that it has violated the Administrative Procedure Act, Texas Government Code, §2001.024(4), by not addressing wholesale raw water providers. The commission did address the additional estimated cost to state and local governments as a result of administering this rule. Although the estimate may not have included every possible local entity, it nevertheless did address state and local impacts. Moreover, the commission's water utilities database lists no wholesale raw water providers in Harris County. Accordingly, the commission did not have data to analyze whether these local entities may have been impacted. No change was made in response to this comment.

SJRA stated that if the commission intended to regulate wholesale raw water providers, then the rule needs to be amended to clarify this intent. SJRA cited specific sections that the commission might need to amend.

The commission responds that §291.161(1) applies to an affected utility that does not meet the definition of a public water system. The commission further responds that the language contained in SB 361, which added TWC, §13.1395(a)(1), defined an affected utility as "a retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water to more than one customer," included raw water service in its definition to capture any affected utilities that are not public water systems. No change was made in response to these comments.

SJRA commented that wholesale raw water service providers should not be required to maintain a minimum of 35 psi throughout their systems during emergency or normal operations and requests the commission's clarification on this issue.

The commission disagrees that the 35 psi requirement does not apply to raw water providers, as the definition of "emergency operations" includes the requirement to maintain 35 psi. An affected utility is required to submit an EPP that demonstrates its ability to provide emergency operations (TWC, §13.1395(b)(2)). "Emergency operations" is defined to include the operation of a water system during an extended power outage at a minimum water pressure of 35 psi (TWC, §13.1395(a)(2)). Accordingly, all affected utilities are required to maintain 35 psi. However, SB 361 also provides for waivers to systems for which the implementation would be a significant financial burden on its customers. No change has been made in response to this comment.

SJRA commented that the March 1, 2010 deadline, set out in §290.39(o)(1) for submitting EPPs, is only applicable to public water systems, and suggests giving a raw water provider a 12-month deadline from rule adoption to submit such plans to the TCEQ.

The commission agrees that the March 1, 2010 deadline in §290.39(o)(1) specifically applies only to public water systems. However, Chapter 291 requires affected utilities that exist as of December 1, 2009, to submit an EPP to the executive director no later than March 1, 2010 (§291.162(j)). These deadlines are consistent with SB 361, which provides that each affected utility shall submit its EPP to the TCEQ no later than March 1, 2010. An affected utility may also request an extension to this deadline, not to exceed 90 days. No changes were made in response to this comment.

SJRA requests clarification that the proposed rules under Chapters 290 and 291 do not apply to the wholesale provision of raw water for industrial purposes.

The commission agrees that the proposed rules do not apply to the wholesale provision of raw water for industrial purposes. No changes were made in response to this comment.

SJRA commented that the fiscal note included in the notice package significantly underestimates the financial burden on many affected utilities by concluding that "the cost increases are not expected to be significant." SJRA noted that even if an affected utility obtains backup generators through a mutual aid agreement, regulated entities will need to spend significant financial resources in evaluating and planning for such needs, addressing transactional costs in developing necessary agreements, and implementing the developed EPP.

The commission responds that existing §290.45 requires all public water systems with at least 250 connections that do not meet elevated storage requirements to have emergency power in place. Therefore, the commission focused its analysis of financial impact on affected utilities having less than 250 connections. The commission only considered the cost of the generator and its maintenance costs and did not consider transactional and design costs. No change was made in response to this comment.

HMW and J&C commented that average daily demand (ADD) was not defined by the regulation. ABHR provided suggested language defining ADD. J&C suggested a new definition for Average Daily Emergency Demand (ADED).

The commission agrees that the ADD is not clearly defined. The commission previously defined ADD by reference to American Water Works Association's (AWWA) 2000 Drinking Water Dictionary. SB 361 did not contain a reference to ADD. In response to these comments, the commission agrees to define ADD in its shell form, TCEQ Form Number 20536, using the AWWA's 2000 Drinking Water Dictionary definition as this term was not presented during the proposal phase. No changes have been made in response to these comments.

J&C recommended revisions to the definition of "auxiliary power" and suggested a new definition for "re-pumping system."

The commission responds that the proposed additional language to the definition of "auxiliary power" is unnecessary because SB 361 requires an affected utility to maintain operation of the water system at a minimum water pressure of 35 psi; therefore, a wholesaler's responsibility will end at the point of delivery to the purchasing water system. The commission declines to revise its definition of "auxiliary power" as SB 361 does not support this change. The commission further declines to add a new definition for "re-pumping system" as this definition is outside the scope of this rulemaking. Finally, because this term was not presented at the proposal phase, public comment was not sought on this proposed revision. No change was made in response to this comment.

J&C recommended revisions to proposed §290.39(c)(4)(B) and (o)(2), and §290.45(h)(4) (renumbered to §290.45(h)(2)) to include groundwater and to remove references to wholesale customers, and instead to include all customers, both wholesale and retail.

The commission declines to revise these sections as SB 361 does not support broadening the applicability to groundwater or including all customers. No change was made in response to this comment.

J&C proposed amending §290.45(a)(7) to allow an affected utility the option of maintaining 35 psi or the minimum pressure needed to supply a re-pumping station during a natural disaster. J&C further suggests that an affected utility be allowed to provide a justification regarding the pressure drop in lieu of the revised EPP.

The commission declines to revise §290.45(a)(7) as SB 361 requires affected utilities to maintain 35 psi during a natural disaster and as the commission is not empowered to revise TWC, §13.1395. The commission concurs with the commenter's second suggestion and, in response to this comment, amended §290.45(a)(7) to include the option of providing justification regarding pressure drop.

HMW and Houston commented that a flow rate of "the greater of the average daily demand or 0.35 gallons per minute per connection" was not required by the statute. Houston commented that 0.35 gallons per minute per connection was not a valid number for large systems, whose maximum demand may be lower than that. Also, water systems that implement water use restrictions during power outages should not be required to maintain 0.35 gallons per minute per connection. J&C recommended changes to water production requirements for community and noncommunity systems to include the use of ADD, based on winter month demands, and suggested revisions to §290.45(h)(1)(A) - (D), including addressing a typographical error by revising "plan" to "plane" in §290.45(h)(1)(D), and recommended the removal of §290.45(h)(2)(A) - (D). HMW noted that it would be difficult to determine what the ADD is, given that summer water demands would be greater than winter demands, and other issues also may affect ADD. ABHR commented that the ADD requirement should apply to community and noncommunity systems.

The commission responds that it concurs with the comments that a flow rate was not required by the statute. In response to these comments, the commission removed the flow requirements from Chapters 290 and 291 because upon further consideration the commission decided that the flow rate for maintaining 35 psi would be better defined in its shell form, TCEQ Form Number 20536. The commission also renumbered the subsequent paragraphs accordingly.

J&C suggested revising proposed §290.45(h)(3) to change the maintenance requirements for generators and right angle drives, to change "auxiliary generator" to "auxiliary power," and to clarify content of leasing and contracting agreements. J&C further sug-

gested revising proposed §290.45(h)(5) to change "generators" to "auxiliary power facilities."

The commission responds that the language in renumbered §290.45(h)(1)(A), (B), and (G) was taken directly from SB 361 and therefore the commission declines to make the suggested revisions. Further, the commission clarifies that mutual aid agreements may include multiple affected utilities' combination of resources, including but not limited to water plant facilities, generators, and fuel, providing that the affected utilities meet the requirements in §290.45(h). Additionally, the commission clarifies that 30 TAC Chapter 117, Subchapter D, Combustion Control at Minor Sources in Ozone Nonattainment Areas, Division 1, Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources, as amended, would also apply. No changes have been made in response to these comments.

HMW, Baytown, ABHR, and Houston requested clarification on when the EPP should be fully implemented and whether "implement" means that an affected utility must only have an EPP approved, or fully implement the plan. They noted that the time needed to complete the plan may be affected by supply of generators, designing, funding, and constructing an emergency power system. Additionally, ABHR commented that the rule should be clear that the implementation period cannot be arbitrarily postponed by setting unnecessarily long timelines for design, installation, construction and/or financing of facilities. Further, Houston commented that the TCEQ's draft rules incorrectly interpreted the definition of implementation, and suggested that this should mean that an affected utility should begin to seek funding and commence the design by the implementation deadline of July 1, 2010, and complete the installation and construction without unreasonable delay. Baytown requested that its plan be allowed to include timelines and benchmarks to design, fund, and construct the components of its back up water supply system. HMW generally supported Baytown and added that water systems should be allowed a reasonable amount of time to implement their EPP. Jacobs Engineering noted that implementation will take longer than March 1, 2010 - July 1, 2010 to have construction complete. Some generators take 13 weeks from the order date until delivery. Jacobs Engineering further remarked that the implementation also included designing the civil and electrical modifications to the water plants. Representative Callegari acknowledged that July 1, 2010, was too soon for complete implementation. Representative Callegari commented that the July 1, 2010 date was not intended to be so binding or demanding as to create a financial hardship on affected utilities. Further, Representative Callegari stated that SB 361 intended for the EPP to be turned in by the implementation date; that the bill was intended to provide guidelines.

The commission agrees that, for the purposes of this rule, "implement" means initiating actions required to comply with an approved EPP. EPPs should include a reasonable time frame for completion of implementation. Full compliance date will be determined on a case-by-case basis by the agency. In response to these comments, the commission has revised §290.47(j), Appendix J to include a requirement that affected utilities include their proposed time frame for full implementation of the EPP.

Baytown commented that, because it is a surface water treatment facility, it will be required to have permanently mounted, automatically starting generators, and cannot avail itself of the eight options available to other affected utilities. Baytown requested language to allow manually started generators when a facility is staffed 24 hours a day, as the restarting of emergency power has to be carefully carried out, with large motor loads that need to be sequenced to turn on the raw water pumps, and will require multiple generators of different voltages. Baytown further noted that it understood that it must do this for its distribution system, but disagreed that it should be required to have automatically starting generators on raw water supply pumps, when there were staff on site 24 hours a day. Pate commented that they do not believe it was the intent of SB 361 to disallow manually started auxiliary generators to meet the requirements of SB 361. Pate further commented that a solution could be to add an additional option to the eight already existing options. The additional option would explicitly allow the use of a manually starting generator, instead of requiring a burdensome exception process.

The commission disagrees that the rule needs to be amended, because the rule captures the intent of the bill. Affected utilities that are not required to supply, provide, or convey surface water to wholesale customers will have eight options, which include automatically starting generators and any other option the commission finds acceptable. Affected utilities that furnish surface water to wholesale customers are limited to two options, automatically starting generators or distributive generation facilities. The commission clarifies that the rules do not disallow manually started auxiliary generators for affected utilities that are not required to supply, provide, or convey surface water to wholesale customers. Therefore, an exception would not be required for manually starting generators. The commission made no changes in response to these comments.

Baytown questioned whether commission wanted affected utilities to submit information on every motor load (chemical feed pumps, heating and cooling systems, etc.).

The commission agrees that submitting information on every motor load is not required. Affected utilities are only required to provide information on that equipment that is required for production, treatment, and distribution of water in order to maintain emergency operations. No changes were made in response to this comment.

Roy Moffitt and RPI were concerned that the rule did not require a fuel supply management plan. Fuel has a short shelf life of around 12 months, so municipal utility districts (MUDs) should invest in a fuel service program. They further stated that the commission should have considered regulations that require: 1) an adequate amount of fuel storage (either bulk on site or third-party tank farm); 2) a fuel maintenance program with proof of service records; and 3) an emergency fuel service agreement. Additionally, RPI suggested that the fuel contingency plan include a minimum of 10 days run time.

The commission agrees fuel storage requirements are important. The proposed rule provides flexibility by allowing utilities the option of maintaining fuel on site, or making fuel readily available, to operate any required emergency power equipment during emergency operations. The adopted rules require an adequate amount of fuel be made available for systems that have emergency power equipment so that they can maintain emergency operations. However, the commission disagrees that it should regulate fuel storage under SB 361, as that bill does not require a fuel maintenance program with proof of service records or an emergency fuel service agreement. In its EPP the commission will require each affected utility to plan how it will continue to function following natural disasters lasting longer than 72 hours. The commission declines to make the commenters' change regarding the fuel storage requirement of 10 days without express

authority from the legislature to do so. In response to these comments, the commission amended renumbered §290.45(h)(6) to replace the 72-hour fuel requirement with the amount of fuel necessary to maintain emergency operations. In addition, the commission amended §290.41(j), Appendix J, to require affected utilities to notify the commission of how they determine the quantity of fuel necessary, and how they propose to continue maintaining emergency operations.

Houston stated the bill did not require 72 hours of fuel storage; it only required that affected utilities maintain power for 24 hours. Further, Houston commented that any increase in volume of fuel on site could trigger additional regulatory requirements such as spill prevention control and counter measure plans as listed in 40 Code of Federal Regulations Part 112 and 30 TAC Chapters 327 and 334. Southwest agreed that SB 361 did not include fuel requirements. Representative Callegari commented that there were two problems associated with fuel storage: ensuring sufficient quantity and preventing attendant problems with leakage and overflow. Sugar Land commented that the 72 hours of fuel storage requirements were not part of SB 361, were onerous, and would cause numerous operational issues and excessive, unnecessary costs. ABHR commented that the 72-hour fuel supply is not financially reasonable or practicable and instead suggested limiting the fuel storage requirement to a 48-hour period. Additionally, ABHR recommended requiring fuel storage only during to the Atlantic hurricane season, June 1 through November 30 of each year. Further, ABHR recommend that, when using natural gas, natural gas users not be required to maintain on-site storage fuel supplies. J&C recommended that the commission clarify that an affected utility may enter into a fuel supply agreement to meet the 72-hour fuel requirement and suggested revisions to renumbered §290.45(h)(6).

The commission agrees that the bill does not require 72 hours of fuel storage. The proposed rule does not require that the fuel, natural gas or otherwise, be maintained on site. In response to these comments, the commission amended renumbered §290.45(h)(6) to replace the 72-hour fuel requirement with the amount of fuel necessary to maintain emergency operations. In addition, the commission amended §290.47(j), Appendix J, to require affected utilities to notify the commission of how they determine the quantity of fuel necessary, and how they propose to continue maintaining emergency operations. The commission disagrees that the rule should be amended to limit the fuel storage requirement to the Atlantic hurricane season.

J&C suggested revising §290.46(f)(5)(C) by removing the word "generators" and replacing it with the phrase "auxiliary power equipment."

The commission responds that SB 361 uses the term generators in its amendment to TWC, §13.1395. Therefore, as the use of this term tracks the legislation, no change has been made in response to this comment.

J&C suggested revising §290.47(j), Appendix J, by removing the word "generators" and replacing it with the phrase "auxiliary power equipment" and further recommended the removal of the language stating mutual aid agreements may not be approved in an area subject to the same natural disaster event. J&C also suggested language requiring affected utilities to evaluate the reliability of their contractual commitments be added to the rule.

The commission responds that SB 361 uses the term generator in its amendment to TWC, §13.1395. Therefore, as the use of this term tracks the legislation, the commission has made no change in response to this comment. In response to the comments regarding the mutual aid agreements, the commission amended §290.47(j), Appendix J, Plan Option 3, to clarify that the intent of SB 361 will be met by all parties in a mutual aid agreement when due consideration is given to where other water providers are located in the event that they are also affected by the same natural disaster. The commission agrees that affected utilities should continually evaluate the reliability of contractual commitments. However, under the provisions of SB 361, this responsibility lies with the commission. Therefore, no change has been made in response to this comment.

Southwest commented that affected utilities generally support the 72-hour fuel requirement, but that conditions following a natural disaster may negate any or all of the agreements for the supply of fuel or at the least cause a portion of the fuel to be diverted to higher priority uses. It also stated that the rules created competition for fuel supplies and that the proposed 72-hour requirement applied after a 24-hour period of loss of power. This would mean that the fuel used inside the first 24 hours would not count towards the 72-hour supply. Therefore, the rule would really require affected utilities to maintain a 96-hour fuel supply.

The commission responds that the 72-hour fuel supply requirement is not in SB 361. These proposed rules would require affected utilities to maintain emergency operations during an extended power outage, starting as soon as it is safe and practicable following the occurrence of a natural disaster. In response to these comments, the commission amended renumbered §290.45(h)(6) to replace the 72-hour fuel requirement with the amount of fuel necessary to maintain emergency operations. In addition, the commission amended §290.47(j), Appendix J to require affected utilities to notify the commission of how they determine the quantity of fuel necessary, and how they propose to continue maintaining emergency operations.

Costello asked for clarification as to whether the 72 hours of fuel storage was meant to be under full load, or whether the intent was to have enough fuel to provide 72 hours of service. Jacobs Engineering supported Costello and added that 72 hours of fuel storage under full load was very different than requiring enough fuel to provide 72 hours of service.

The commission agrees that this rule language is not clear. The commission revised the adopted rule language to clarify that "under load" did not mean "under full load," but rather the load required to provide emergency operations. In response to this comment, the commission amended renumbered §290.45(h)(6) and §290.47(j), Appendix J to clarify that the fuel requirement is the amount needed to maintain emergency operations, rather than under full load.

Costello stated that engineers interpreted the rule to mean that if they met the EPP, they were no longer required to have elevated storage. Costello did not believe this was the intent. J&C commented that elevated storage requirements can be used to meet the 72-hour fuel requirement. Houston, Pate, and ABHR recommended the commission automatically grant a waiver or exception to systems with an approved EPP. Houston and Pate opposed the inclusion of §290.45(g)(5)(A)(iv) in the rule. ABHR commented that the commission improperly interpreted SB 361 to allow elevated storage to be a method of compliance with SB 361. Houston commented that the commission should delete renumbered §290.45(h)(5) as its proposed rules were redundant.

The commission agrees that SB 361 requires the commission to implement the EPP requirement as an alternative to any rule requiring elevated storage. EPPs that are used in lieu of meeting elevated storage requirements must be prepared under the direct supervision of a licensed professional engineer. In response to these comments, the commission amended §290.45 to make the EPP an alternative to elevated storage requirements, provided the affected utility can meet the pressure and flow requirements of Chapter 290, Subchapter D, under normal operating conditions. However, the commission will not grant automatic waivers or exceptions of elevated storage tank requirements upon EPP approval by the commission. The commission clarifies that such a change in pressure maintenance capacity is a significant change in accordance with §290.39(j). Accordingly, existing affected utilities are required to notify the executive director prior to making this change. Proposed new affected utilities who choose to meet the requirements of SB 361 in lieu of any rule regarding elevated storage requirements are required to include the proposed method of meeting the minimum pressure requirements in the engineering report required by §290.39(e)(1). No changes have been made in response to these comments.

Bacon & Wallace commented that the commission should consider allowing small MUDs to piggyback on larger MUDs' plans so they don't have to bear the cost that the plan imposes on their customers.

The commission has proposed rules that give affected utilities not providing surface water to wholesale customers' eight options for emergency operations. One of those options is the negotiation of leasing and contracting agreements, including emergency mutual aid agreements with other affected utilities. The commission made no changes in response to this comment.

Jacobs Engineering commented that there was no percentage of water needed to be sold to affected utilities that purchase water; for example, Houston was not required to provide a percentage of water to its purchasing water systems during emergencies. Jacobs Engineering also stated that the rule did not require wholesalers to provide certain capacities, and asked whether compliance would be strictly a contractual issue. NHRWA recommended that the commission modify its language to include water supply requirements for wholesalers.

The commission currently evaluates the capacities of purchased water systems based on their actual capacities, if any, combined with what is specified in their purchase contracts. Wholesalers must meet the sum of their contractual obligations. The proposed rule does not require wholesalers to provide any capacities beyond those specified in their contractual obligations. Alternatively, if a wholesaler and purchaser agree, they can submit an EPP that uses the option to share auxiliary generator capacity. No changes were made in response to this comment.

Sugar Land commented that the rules should be implemented in two tiers with consideration given to the systems with professional staff versus those with contract operation firms; municipalities and water providers with employees should have less onerous requirements than those that rely on contract operations for managing their system during an emergency event.

The commission disagrees that a tiered system should be implemented. SB 361 does not include provisions for implementing rules in tiers. No changes were made in response to this comment.

Southwest requested that the term "as soon as safe and practicable" be revised to read "as soon as safe and practicable as determined by the affected utility's emergency preparedness and response plan or such document."

The commission responds that the determination of when it is safe and practicable will be determined on a case-by-case basis. The commission and the affected utility may use information provided by the office of emergency management of each county and/or the Texas Division of Emergency Management, or other sources, to help assess the situation. The commission made no change in response to this comment.

Southwest requested clarification on §290.39(d) regarding whether EPPs needed to be prepared under the direction of a licensed professional engineer.

The commission does require that EPPs be prepared under the direction of a licensed professional engineer when an affected utility has been granted or is requesting an alternative capacity requirement in accordance with §290.45(g), or is requesting to meet the requirements of TWC, §13.1395 as an alternative to any rule requiring elevated storage, or as determined by the commission on a case by case basis. In response to this comment, the commission has amended §290.39(c)(4)(A) and (o)(1) to add language that clarifies when EPPs are required to be submitted under the direction of a licensed professional engineer.

Southwest recommended that the Plan Content under §290.47(j), Appendix J should be written for the affected utilities use and should be straightforward without undue detail. Southwest stated that the 22 items listed under this section are not all applicable and go beyond the intent of the plan, which is to supply water under emergency power. Southwest also requested that the template be reviewed by a subcommittee of TCEQ personnel and representatives from the affected utilities. J&C questioned whether §290.47(j), Appendix J is the official template for the EPP and further commented that its understanding is that this template will be released on December 1, 2009.

The commission clarifies that not all items listed in §290.47(j), Appendix J are applicable to all affected utilities as §290.47(j), Appendix J merely outlines the minimum elements that may need to be considered in an affected utility's EPP. Section 290.47(j), Appendix J does not include a shell EPP, but the commission recognizes that an example would benefit the affected utilities and, in response to this comment, is developing a shell EPP (form 20536) that will be made available on the commission's website when complete. Form 20536 provides flexibility in the implementation of SB 361, allowing the commission to adjust it as needed without a separate rulemaking project. The commission will consider comments from the affected utilities regarding amendments to form 20536. The commission declines to form a subcommittee comprised of commission staff and representatives of affected utilities due to the short implementation requirements associated with SB 361, which require the rules to be adopted by December 1, 2009. No changes were made in response to these comments.

Richmond commented that this rule is unduly burdensome and they already have the required number of generators in place. Further, Richmond's plans include turning off its water treatments plants and evacuating with the public.

The commission responds that, at this time, based upon the Year 2000 Census data, counties other than Harris are not subject to the provisions of SB 361 or this rule. At such time that a sys-

tem becomes an affected utility it can submit information showing that these rules would be a significant financial burden to its customers and request a waiver. One of the eight options in the EPP allows an affected utility to use any other alternative that is determined by the commission to be acceptable. No change was made in response to this comment.

SPH commented that the statement in §290.47(j), Appendix J that mutual aid agreements "may not be approved if the other water service provider is located in an area subject to the same natural disaster event as the affected utility" should be removed. SPH also commented that commission staff indicated at the first public hearing in Harris County that they would not approve any mutual aid agreements. The comment indicated that mutual aid agreements should instead be encouraged, especially as that may be the only option for some affected utilities to comply with SB 361.

The commission responds that the provision referenced above was included in §290.47(j), Appendix J because the TCEQ's experience following natural disasters has indicated that multiple water systems that are located near each other are frequently affected equally by a natural disaster and the corresponding loss of power. Therefore, it may not be of benefit to an affected utility to have a mutual aid agreement with a nearby affected utility or other water system. The commission's staff will consider all mutual aid agreements and will be reviewing the locations of the affected utilities that have entered into such an agreement during its review. Each EPP will be reviewed on an individual basis. If the commission determines that it meets the requirements of SB 361 by providing adequate protection for emergency operations without relying on affected utilities in the vicinity that may also be affected by the natural disaster, and therefore be unable to respond in accordance with the terms of the mutual aid agreement, it will be deemed adequate until demonstrated otherwise. The commission reviewed the transcript record of the Houston public hearing and was not able to find the source of the mutual aid rejection comment. However, the commission clarifies that it will consider all mutual aid agreements submitted as part of an EPP. No changes have been made in response to these comments.

SPH requested clarification as to whether the proposed §290.45(g)(5)(A)(iv) would require two affected utilities that individually have less than 2,500 connections and who operate as a single system with more than 2,500 connections through a mutual aid agreement during emergencies be required to conduct hydraulic modeling.

The commission clarifies that §290.45(g)(5)(A)(iv) does not impact all affected utilities. This rule only applies to public water systems that are affected utilities and are requesting alternative pressure maintenance capacity requirements. Two affected utilities that are each less than 2,500 connections and operate as a single system with more than 2,500 connections only during emergency operations are not considered to have a permanently open interconnect in accordance with §290.45(b)(1)(D)(i). These affected utilities will not be evaluated as a single system and thus will not be required to conduct hydraulic modeling as part of their EPP unless they are proposing to meet the SB 361 requirements in lieu of any rule requiring elevated storage, or have obtained or plan to request an alternative capacity requirement. No changes have been made in response to these comments.

SPH asked whether water systems that purchase water but do not have any production, storage, service pump, or pressure maintenance capacity should be considered affected utilities, since they would derive no benefit from facilities such as purchased or leased generators, hardened electrical lines, or right angle drives.

The commission responds that the requirements of the rule apply to purchase water systems. Under this rule, these systems have the option of using wholesale emergency power capacity to meet the provisions of SB 361 which allows the sharing of auxiliary generator capacity with one or more affected utilities. Further, the commission responds that a copy of the purchase water contract or agreement will need to be included as part of the EPP. No changes have been made in response to these comments.

STATUTORY AUTHORITY

The new rules are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state; and TWC, §5.105, which authorizes the commission to adopt rules as necessary to carry out its powers and duties under the TWC. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated or implied by TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted new rules implement TWC, §13.1395.

§291.161. Definitions.

For the purposes of this subchapter, the following definitions apply.

(1) Affected utility--Any retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water service to more than one customer:

(A) In a county with a population of 3.3 million or more; or

(B) In a county with a population of 400,000 or more adjacent to a county with a population of 3.3 million or more.

(2) Emergency operations--The operation of a water system during an extended power outage at a minimum water pressure of 35 pounds per square inch.

(3) Extended power outage--A power outage lasting for more than 24 hours.

(4) Population--The population shown by the most recent federal decennial census.

§291.162. Emergency Operation of an Affected Utility.

(a) An affected utility shall adopt and submit to the executive director for its approval an emergency preparedness plan that demonstrates the utility's ability to provide emergency operations.

(b) The executive director shall review an emergency preparedness plan submitted by an affected utility. If the executive director determines that the plan is not acceptable, the executive director shall recommend changes to the plan. The executive director must make its recommendations on or before the 90th day after the executive director receives the plan.

(c) An emergency preparedness plan shall provide for one of the following:

(1) the maintenance of automatically starting auxiliary generators;

(2) the sharing of auxiliary generator capacity with one or more affected utilities;

(3) the negotiation of leasing and contracting agreements, including emergency mutual aid agreements with other retail public utilities, exempt utilities, or providers or conveyors of potable or raw water service, if the agreements provide for coordination with the division of emergency management in the governor's office;

(4) the use of portable generators capable of serving multiple facilities equipped with quick-connect systems;

(5) the use of on-site electrical generation or distributed generation facilities;

(6) hardening the electric transmission and distribution system serving the water system;

(7) for existing facilities, the maintenance of direct engine or right angle drives; or

(8) any other alternative determined by the executive director to be acceptable.

(d) Each affected utility that supplies, provides, or conveys surface water to wholesale customers shall include in its emergency preparedness plan provisions for the actual installation and maintenance of automatically starting auxiliary generators or distributive generation facilities for each raw water intake pump station, water treatment plant, pump station, and pressure facility necessary to provide water to its wholesale customers.

(e) The affected utility may use the template in Appendix J of §290.47 of this title (relating to Appendices) to assist in preparation of the plan.

(f) An emergency generator used as part of an approved emergency preparedness plan must be operated and maintained according to the manufacturer's specifications.

(g) The executive director may grant a waiver of the requirements of this section to an affected utility if the executive director determines that compliance with this section will cause a significant financial burden on customers of the affected utility. The affected utility shall submit financial, managerial, and technical information as requested by the executive director to demonstrate the financial burden.

(h) An affected utility may adopt and is encouraged to enforce limitations on water use while the utility is providing emergency operations.

(i) Information provided by an affected utility under this subchapter is confidential and is not subject to disclosure under Texas Government Code, Chapter 552.

(j) Affected utilities that are existing as of December 1, 2009, shall submit the emergency preparedness plan to the executive director no later than March 1, 2010.

(k) Affected utilities which are established after the effective date of this rule must have emergency preparedness plans approved and implemented prior to providing water to customers.

(l) An affected utility may file with the executive director a written request for an extension, not to exceed 90 days, of the date by which the affected utility is required under this subchapter to submit the affected utility's emergency preparedness plan or the date the affected utility is required to implement the plan.

(m) If an affected utility fails to provide a minimum of 35 pounds per square inch throughout the distribution system during emergency operations as soon as it is safe and practicable following the occurrence of a natural disaster, a revised emergency preparedness plan shall be submitted for review and approval within 180 days of the date normal power is restored. Based on the review of the revised emergency preparedness plan, the executive director may require additional or alternative auxiliary emergency facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2009.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: August 28, 2009
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 10. EXPLORATION AND DEVELOPMENT OF STATE MINERALS OTHER THAN OIL AND GAS

31 TAC §§10.1 - 10.9

The Texas General Land Office "GLO" adopts the amendments to §10.1, relating to Definitions, Exploration and Development Guide; §10.2, relating to Prospect Permits on State Lands; §10.3, relating to Mining Leases on Properties Subject to Prospect; §10.4, relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid; §10.5, relating to Mining Leases on Relinquishment Act Lands; §10.6, relating to Sulphur Unit Agreements; §10.7, relating to Conduct of Exploration and Mining Operations; §10.8, relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements; and §10.9, relating to Mineral Awards and Patents. The amendments are adopted without changes to the proposal as published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6415) and will be not be republished.

BACKGROUND, REASONED JUSTIFICATION, AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted amendments is to add new definitions to the rules, to renumber the existing rules, to clarify the rules, to change certain permissive rules to mandatory rules and to conform the rules to other existing rules located in Chapter 9. The adopted amendments will enable the GLO to administer the rules more concisely, fairly and efficiently.

The GLO adopts the amendments to §10.1, relating to Definitions; Exploration and Development Guide. The GLO adopts the amendment to §10.1(a)(5) for the new definition of mineral. The GLO adopts the amendments to renumber the definitions section following the new definition of mineral. The GLO adopts to amend renumbered §10.1(a)(13) by adding the words "if any" to the paragraph. The GLO adopts the amendment to §10.1(b)(1)(B) by deleting the words "and shell, sand, and gravel" from this section.

The GLO adopts the amendments to §10.2, relating to Prospect Permits on State Lands. The GLO adopts the amendment to new subsection (b) and renumbers the remaining subsections accordingly. The adopted new subsection (b) would allow the Land Commissioner to conduct competitive prospect permit sales, similar to lease sales, that will provide the greatest income to the PSF when there is known competition for the resource. The GLO adopts the amendment to renumbered subsection (c)(1)(B) to delete the provision requiring the lessee to provide evidence of payment of payment franchise taxes. The GLO adopts the amendment to the renumbered subsection (c)(4) to make a conforming change and to raise the fee for the first year rental payment on a prospect permit from $.50 per acre to not less than $1.00 per acre. The GLO adopts the amendment to renumbered subsection (c)(6) to allow the GLO flexibility in the order in which a Mining Lease under §10.3(b)(1) is issued. The GLO adopts the amendment to renumbered subsection (c)(7) to allow the GLO the option of rejecting a prospect application for a tract of land encumbered by a previously received application or by a valid prospect permit. The GLO adopts the amendment to renumbered subsection (c)(9) to allow the GLO to request any information the GLO needs to determine whether the issuance of a permit in the best interest of the PSF. The GLO adopts the amendment to renumbered subsection (d)(1) to allow the GLO not to issue a prospect permit if an immediate mining lease has already been issued under §10.2(d)(1) for the same tract of land. The GLO adopts the amendment to renumbered subsection (d)(2) to allow the GLO to issue a prospect permit for a period of less than one year and raises the fee for the annual rental payment on a prospect permit from $.50 per acre to not less than $1.00 per acre. The GLO adopts the amendment to renumbered subsection (e)(1) to allow the GLO to issue a renewal and extension of a prospect permit for a period of up to one year from the expiration date of the prospect permit. The GLO adopts the amendment to renumbered subsection (e)(2) to make a conforming change and to allow the GLO to consider, when deciding whether to renew and extend a prospect permit, whether to do so is in the best interest of the Permanent School Fund. The GLO adopts the amendment to relettered subsection (f) to make a conforming change.

The GLO adopts the amendment to §10.3, relating to Mining Leases on Properties Subject to Prospect. The GLO adopts the amendment to §10.3(b)(1) to allow the Land Commissioner to issue a mineral lease rather than a prospect permit if doing so is in the best interests of the Permanent School Fund. The GLO adopts the amendment to clarify subsection (b)(3)(D) and (E) that the required the tax ID number required in a lease application is the Texas Comptroller's tax ID number and to delete the provision requiring the lessee to provide evidence of payment of franchise taxes. The GLO adopts the amendment to subsection (b)(5) to make a conforming change. The GLO adopts the amendment to subsection (c)(5) to put the lessee on notice that a lease is not effective until a certified copy of the lease is received by the GLO and allow the Land Commissioner to rescind a mineral lease granted to a lessee who has not provided the GLO with a certified copy of the filing within 90 days of the transmittal letter. This change makes recording requirements for hard mineral leases consistent with oil and gas leases. The GLO adopts the amendment to subsection (d)(1) to allow the GLO to issue a lease with a fixed-term if the commissioner determined that it is in the best interest of the PSF. The GLO adopts the amendment to subsection (d)(6) to clarify that surface damage payments are only required on tracts in which the state owns the surface.

The GLO adopts the amendment to §10.4, relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid. The GLO adopts the amendment to subsection (a) to reference §10.2(b) of this title (relating to Prospect Permits on State Lands) for other minerals that may be leased under §10.4. The GLO adopts the amendment to subsection (b) to reference §9.11 of this title (relating to Geophysical and Geochemical Exploration Permits). The GLO adopts the amendment to subsection (c)(1) to make a conforming change. The GLO adopts the amendment to subsection (c)(2) to clarify that failure to notify the surface owner of the issuance of a lease does not affect the validity of the lease. The GLO adopts the amendment to subsection (d)(3) to clarify that surface damage payments are only required on tracts in which the state owns the surface.

The GLO adopts the amendment to §10.5, relating to Mining Leases on Relinquishment Act Lands. The GLO adopts the amendment to subsection (a)(1) and (a)(2) to make conforming changes. The GLO adopts the amendment to subsection (b)(1)(B) to let an entity know that if they have stock ownership of 5% or more they may not receive a state lease or assignment of a state lease. The GLO adopts the amendment to subsection (d)(2) to require receipt of a certified copy of the lease within 90 days of execution. The GLO adopts the amendment to subsection (d)(4) to make a conforming change. The GLO adopts the proposed deletion of existing subsection (g) and replace it with a new language titled, Lease by owner of the soil, to allow the GLO to describe the procedures that the owner of the soil on Relinquishment Act Land must use to lease the land for mining purposes.

The GLO adopts the amendment to §10.6, relating to Sulphur Unit Agreements. The GLO adopts the amendment to delete GLO in §10.6(b)(1) and add SLB.

The GLO adopts the amendment to §10.7, relating to Conduct of Exploration and Mining Operations. The GLO adopts the amendment to subsection (a)(1), to make a conforming change. The GLO adopts the amendment to subsection (a)(2) to specify the date before which a plan of operation may not be required. The GLO adopts the amendment to subsection (a)(5), to make a conforming change. The GLO adopts the amendment to subsection (b)(5), to expand the definition of "Permit" to include an exploration permit issued by the Land Commissioner under §10.4 of this title (relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid). The GLO adopts the amendment to subsection (b)(6), to expand the definition of "Permittee" to include the holder of an exploration permit. The GLO adopts the amendment to subsection (c)(2)(A), to make a conforming change. The GLO adopts the amendment to subsection (e)(1), to delete the requirement that the GLO acknowledge receipt of a proposed plan of operation. The GLO adopts the amendment to subsection (f)(4), to make a conforming change. The GLO adopts the amendment to subsection (f)(5), to require an operator to comply with all applicable federal and state laws regarding the disposal and treatment of hazardous materials and liquid

wastes in addition to the other existing requirements. The GLO adopts the amendment to subsection (g)(1)(G) to include the term "excavation sites". The GLO adopts the amendment to subsection (h)(3) to allow the GLO to hold a reclamation bond until reclamation has been successfully completed.

The GLO adopts the amendment to §10.8, relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements. The GLO adopts the amendment to subsection (a)(1), to prohibit assignment of a lease if it is prohibited by language in the lease or permit and eliminates the requirement that the Land Commissioner give written consent before liability of the transferee begins. The GLO adopts the amendment to subsection (a)(2), to make a conforming change. The GLO adopts the amendment to subsection (a)(4), to make a conforming change. The GLO adopts the amendment to subsection (b)(1), to require a log, sample analysis or other information from a test drill be filed with the GLO. The GLO adopts the amendment to subsection (b)(2) to give notice to the lessee that more than one royalty report may be required when multiple minerals are produced under the same lease. The GLO adopts new subsection (b)(3) that would allow the GLO to require the installation and use of any reasonable method of measuring to insure proper measurement of the leased minerals.

The GLO adopts the amendment to §10.9, relating to Mineral Awards and Patents. The GLO adopts the amendment to subsection §10.9(h)(2), to make a conforming change.

PUBLIC COMMENTS

The GLO did not receive any comments on the proposed amendments.

STATUTORY AUTHORITY

Texas Natural Resources Code, §§31.051(3), 32.062(a), 32.205 and 33.064.

Cross reference to statute: Texas Natural Resources Code §§31.051(3), 32.062(a), 32.205 and 33.064.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2009.

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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

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CHAPTER 13. LAND RESOURCES
SUBCHAPTER A. RULES, PRACTICE, AND PROCEDURE FOR LAND LEASES AND TRADES

31 TAC §13.1, §13.3

The Commissioner of the Texas General Land Office (GLO) adopts amendments to §13.1, relating to Leases, and §13.3, relating to Grants and Credits. The GLO adopts the amendments to §13.1 and §13.3 without changes to the proposal as published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6424).

The proposed amendments were undertaken as a result of the passage of Senate Bill (S.B.) 654 during the 80th Texas Legislature, which amended portions of Chapter 51 of the Texas Natural Resources Code (TNRC). Amendments were also made to establish consistency with current practices and procedures and to avoid duplication with statutes and standard contract language.

S.B. 654 modified Chapter 51 of the TNRC so that the Commissioner may determine the terms and conditions of GLO leases and easements that authorize the use of public lands for private purposes. Existing provisions that required specific terms and conditions or that limited the ability of the Commissioner to determine the terms and conditions that are in the best interest of the state are amended or eliminated.

FISCAL AND EMPLOYMENT IMPACTS

Mr. Rene Truan, Deputy of the Professional Services Division, has determined that for each year of the first five years the adopted rule amendments will be in effect, there will be no significant fiscal implication to state or local government as a result of enforcing or administering these adopted amended sections.

Mr. Truan has also determined that for each year of the first five years that the amended sections as adopted will be in effect, there will be no significant economic costs to the public.

Mr. Truan has also determined that for each year of the first five years that the proposed adopted sections will be in effect, the anticipated impact on local employment will be insignificant.

PUBLIC BENEFIT

Mr. Truan has determined that the public will benefit because with the adopted amended sections the GLO will be able to administer its leasing program, including granting of credits for improvements, more efficiently and the public will benefit from the certainty and clarity in the revised processes. The public will also benefit from the reduction in the number and length of the Chapter 13 rules and will be able to avoid duplicitous requirements previously found between these rules, Chapter 51 of the TNRC and the GLO administrative procedures.

SMALL BUSINESS ANALYSIS

Mr. Truan has determined that the adopted amended sections will have no significant effect on small businesses during each year of the first five years these sections are in effect.

TAKINGS IMPACT ASSESSMENT

The General Land Office (GLO) has evaluated the adopted rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The GLO has determined that the adopted rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the adopted rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise

exist in the absence of the rule amendments. The GLO has determined that the proposed rulemaking will not result in a taking of private property and that there are no adverse impacts on private property interests inasmuch as the property subject to the adopted amendments is owned by the state.

CONSISTENCY WITH CMP

The adopted rulemaking is subject to the CMP, 31 TAC §505.11(a)(1)(C) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12, relating to Goals; §501.17, relating to Policy for Construction, Operation, and Maintenance of Oil and Gas Exploration and Production Facilities; and §501.24, relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands. The adopted rulemaking allows the Commissioner to determine terms and conditions of GLO leases that authorize the use of public lands for private purposes, not the manner in which operations are conducted. Therefore, since requests for the use of coastal public land must continue to meet the same criteria for GLO approval, the GLO had determined that the adopted amendments were distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the adopted rules during the comment period.

PUBLIC COMMENTS

The GLO did not receive any comments on the amendments.

STATUTORY AUTHORITY

These adopted rules were modified in accordance with the authority of the commissioner in §51.121 of the TNRC to set terms and conditions for leases and under the commissioner's authority in §51.014 of the TNRC to establish rules that carry out the provisions of the chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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SUBCHAPTER B. RIGHTS-OF-WAY OVER PUBLIC LANDS

31 TAC §13.11

The Commissioner of the Texas General Land Office (GLO) adopts the repeal of §13.11, relating to Application. The GLO adopts the repeal to §13.11 without changes to the proposal as published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6427).

The repeal of §13.11 was undertaken as a result of the passage of Senate Bill (S.B.) 654 during the 80th Texas Legislature, which amended portions of Chapter 51 of the Texas Natural Resources Code (TNRC). Amendments and repeals were made to establish consistency with current practices and procedures and to avoid duplication with statutes and standard contract language.

S.B. 654 modified Chapter 51 of the TNRC so that the Commissioner may determine the terms and conditions of GLO leases and easements that authorize the use of public lands for public purposes. Existing provisions that required specific terms and conditions or that limited the ability of the Commissioner to determine the terms and conditions that are in the best interest of the state are amended or eliminated.

FISCAL AND EMPLOYMENT IMPACTS

Mr. Rene Truan, Deputy of the Professional Services Division, has determined that for each year of the first five years the repealed rule will be in effect, there will be no significant fiscal implication to state or local government as a result of enforcing or administering this repealed section. Administration of the adopted repeal of §13.11 will allow the Commissioner to determine the terms and conditions that are in the best interest of the state are amended or eliminated.

Mr. Truan has also determined that for each year of the first five years that the repealed section will be in effect, there will be no significant economic costs to the public.

Mr. Truan has also determined that for each year of the first five years that the repealed section will be in effect, the anticipated impact on local employment will be insignificant.

PUBLIC BENEFIT

Mr. Truan has determined that the public will benefit because with the repealed section, the GLO will be able to administer its right-or-way easement program more efficiently and the public will benefit from the certainty and clarity in the revised processes. The public will also benefit from the reduction in the number and length of the Chapter 13 rules and will be able to avoid duplicitous requirements previously found between these rules, Chapter 51 of the TNRC and the GLO administrative procedures.

SMALL BUSINESS ANALYSIS

Mr. Truan has determined that the repealed section will have no significant effect on small businesses during each year of the first five years these sections are in effect.

TAKINGS IMPACT ASSESSMENT

The General Land Office (GLO) has evaluated the adopted rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The GLO has determined that the adopted rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the adopted rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule. The GLO has determined that the adopted rulemaking will not result in a taking of private property and that there are no adverse impacts on private property

interests inasmuch as the property subject to the adopted repeal is owned by the state.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The adopted rulemaking is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(C) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed this adopted action for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12, relating to Goals; §501.17, relating to Policy for Construction, Operation, and Maintenance of Oil and Gas Exploration and Production Facilities; and §501.24, relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands. The adopted rulemaking allows the Commissioner to determine terms and conditions of GLO leases that authorize the use of public lands for private purposes, not the manner in which operations are conducted. Therefore, since requests for the use of coastal public land must continue to meet the same criteria for GLO approval, the GLO had determined that the adopted repeal was distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the adopted repeal during the comment period.

PUBLIC COMMENTS

The GLO did not receive any comments on the repeal.

STATUTORY AUTHORITY

This repealed rule was modified in accordance with the authority of the commissioner in §51.121 of the TNRC to set terms and conditions for leases and under the commissioner's authority in §51.014 of the TNRC to establish rules that carry out the provisions of the chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905328
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: December 9, 2009
Proposal publication date: September 18, 2009
For further information, please call: (512) 475-1859

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31 TAC §§13.12, 13.13, 13.17, 13.19

The Commissioner of the Texas General Land Office (GLO) adopts amendments to §13.12, relating to Nature of the Grant; §13.13, relating to Renewal, Assignment, Termination; §13.17, relating to Fees for Right-of-Way of Easement; and §13.19, relating to Protection of Certain State Land. The GLO adopts the amendments to §§13.12, 13.13, 13.17 and 13.19 without changes to the proposal as published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6428).

The proposed amendments were undertaken as a result of the passage of Senate Bill (S.B.) 654 during the 80th Texas Legislature, which amended portions of Chapter 51 of the Texas Natural Resources Code (TNRC). Amendments were also made to establish consistency with current practices and procedures and to avoid duplication with statutes and standard contract language.

S.B. 654 modified Chapter 51 of the TNRC so that the Commissioner may determine the terms and conditions of GLO leases and easements that authorize the use of public lands for private purposes. Existing provisions that required specific terms and conditions or that limited the ability of the Commissioner to determine the terms and conditions that are in the best interest of the state are amended or eliminated.

FISCAL AND EMPLOYMENT IMPACTS

Mr. Rene Truan, Deputy of the Professional Services Division, has determined that for each year of the first five years the rule amendments will be in effect, there will be no significant fiscal implication to state or local government as a result of enforcing or administering these amended sections. Administration of the amendments to §§13.12, 13.13, 13.17 and 13.19 will allow the Commissioner to determine the terms and conditions of GLO easements that authorize the use of public lands for private purposes so that they are in the best interest of the State and ultimately bring the most revenue for the Permanent School Fund.

Mr. Truan has also determined that for each year of the first five years that the adopted sections as adopted will be in effect, there will be no significant economic costs to the public.

Mr. Truan has also determined that for each year of the first five years that the adopted sections will be in effect, the anticipated impact on local employment will be insignificant.

PUBLIC BENEFIT

Mr. Truan has determined that the public will benefit because with the adopted amended sections the GLO will be able to administer its leasing program, including granting of credits for improvements, more efficiently and the public will benefit from the certainty and clarity in the revised processes. The public will also benefit from the reduction in the number and length of the Chapter 13 rules and will be able to avoid duplicitous requirements previously found between these rules, Chapter 51 of the TNRC and the GLO administrative procedures.

SMALL BUSINESS ANALYSIS

Mr. Truan has determined that the adopted sections will have no significant effect on small businesses during each year of the first five years these sections are in effect.

TAKINGS IMPACT ASSESSMENT

The General Land Office (GLO) has evaluated the adopted rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The GLO has determined that the adopted rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the adopted rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The GLO has determined that the rulemaking will not result in a taking of private property and that there are no adverse impacts

on private property interests inasmuch as the property subject to the adopted amendments is owned by the state.

CONSISTENCY WITH CMP

The adopted rulemaking is subject to the CMP, 31 TAC §505.11(a)(1)(C) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed these adopted actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12, relating to Goals; §501.17, relating to Policy for Construction, Operation, and Maintenance of Oil and Gas Exploration and Production Facilities; and §501.24, relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands. The adopted rulemaking allows the Commissioner to determine terms and conditions of GLO leases that authorize the use of public lands for private purposes, not the manner in which operations are conducted. Therefore, since requests for the use of coastal public land must continue to meet the same criteria for GLO approval, the GLO had determined that the adopted amendments were distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the adopted rules during the comment period.

PUBLIC COMMENTS

The GLO did not receive any comments on the amendments.

STATUTORY AUTHORITY

These adopted rules were modified in accordance with the authority of the commissioner in §51.121 of the TNRC to set terms and conditions for leases and under the commissioner's authority in §51.014 of the TNRC to establish rules that carry out the provisions of the chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2009.

TRD-200905329
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: December 9, 2009
Proposal publication date: September 18, 2009
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 58. OYSTERS AND SHRIMP

SUBCHAPTER A. STATEWIDE OYSTER FISHERY PROCLAMATION

31 TAC §58.11, §58.21

The Texas Parks and Wildlife Commission adopts amendments to §58.11, concerning Definitions, and §58.21, concerning Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules, without changes to the proposed text as published in the July 24, 2009, issue of the *Texas Register* (34 TexReg 4843).

The amendment to §58.11 implements the provisions of Senate Bill 2379, enacted by the 81st Texas Legislature (2009), which amended Parks and Wildlife Code, Chapter 76, to add definitions for "barrel of oysters," "natural oyster bed," and "open season." The amendment adds those definitions to the current rule. The amendment also replaces references to the Texas Department of Health Seafood Safety Division, which has been reorganized and renamed, with references to the Texas Department of State Health Services, which is the state agency responsible for health certification of shellfish.

The amendment to §58.21 closes public oyster reefs in the East Bay Approved Area in Galveston Bay for two harvest seasons, which will allow for oyster habitat to repopulate with oysters and for those oysters to reach market size. Private oyster leases are not affected by the closure. The amendment also replaces a reference in subsection (c) to the Texas Department of Health Seafood Safety Division, which has been reorganized and renamed and is now the Texas Department of State Health Services. The Texas Department of State Health Services is the state agency responsible for health certification of shellfish.

Under Parks and Wildlife Code, §76.033, the department is required to specify the exact area of beds or reefs from which oysters may be taken. Additionally, Parks and Wildlife Code, §76.115, authorizes the commission to close an area to the taking of oysters when the commission finds that the area is being overworked or damaged or the area is to be reseeded or restocked. Under Parks and Wildlife Code, §76.116, oysters cannot be taken from an area that has been closed by the Department of State Health Services (DSHS). DSHS currently allows the harvest of oysters in approved areas of Galveston Bay and the department by permit regulates that harvest.

The last complete pre-Hurricane Ike harvest season for public reefs (November 1, 2007 - April 30, 2008) and private lease reefs (September 1, 2007 - August 31, 2008) in East Bay showed that East Bay accounted for 19% (691,964 lbs.) of coastwide oyster harvest and 25% of total oyster harvest from the Galveston Bay Complex. The 15 private lease sites located within the proposed closure area accounted for 45% (311,010 lbs.) of all oysters harvested from East Bay. Total ex-vessel values (the value of the oysters landed) during that season totaled $2.4 million, 20% of the coastwide value of oyster landings.

When Hurricane Ike struck the Texas gulf coast region on September 13, 2008, it caused extensive damage to the oyster reef habitat in East Bay. The damage was mainly caused by siltation on the reefs and the deposition of sediment on reef material. This siltation does not allow for spat (juvenile oysters) to set on the reef and begin the process of oyster reef repopulation. Sidescan sonar surveys conducted by department staff indicated an approximately 50-60% loss of oyster habitat in Galveston Bay due to heavy sedimentation/siltation and debris over consolidated reefs. The impact was greatest in East Bay, where over 80% of oyster habitat was lost.

In order to repopulate the reefs in East Bay, the department has begun a restoration effort on approximately 20 acres in East Galveston Bay. This effort involves placing additional cultch (reef) material on damaged areas, allowing spat to attach to the material so that restoration can begin. A portion of the 20 acres will be set aside as a research reef. Total oyster reef area permitted for this effort is 350 acres.

The department has determined that the reefs must be closed to harvest for at least two years in order to repopulate the public oyster reefs in East Bay and allow oysters to reach market size.

The rules as adopted will function by updating definitions to reflect changes to terminology made by the legislature, and by closing specific areas of East Galveston Bay to the harvest of oysters.

One commenter opposed adoption of the portion of the proposed rules that closed certain portions of East Galveston Bay to the harvest of oysters and stated that the department should use prop-wash deflectors to remove silt from damaged oyster reefs. The department disagrees with the comment and responds that the efficacy of prop-wash deflectors in cleaning siltation off of oyster reefs for repopulation has been looked at but due to the reef profiles in East Bay the department prefers to employ repopulation strategies of placing cultch material or using bagless dredges. In addition, the department will continue to look for the most efficient and cost effective rehabilitation strategies but the proposal to close the area will enable any strategy to be benefited by allowing oysters to reach market sizes. No changes were made as a result of the comment.

The department received 12 comments supporting adoption of the proposed amendments.

No groups or associations commented in support of or in opposition to the adoption of the proposed amendments.

The amendments are adopted under Parks and Wildlife Code, §76.301, which authorizes the commission to regulate the taking, possession, purchase, and sale of oysters.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905297
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 6, 2009
Proposal publication date: July 24, 2009
For further information, please call: (512) 389-4775

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PART 5. BOARDS FOR LEASE OF STATE-OWNED LANDS

CHAPTER 201. OPERATIONS OF THE TEXAS PARKS AND WILDLIFE DEPARTMENT AND TEXAS DEPARTMENT OF CRIMINAL JUSTICE BOARD FOR LEASE

31 TAC §201.6

The Texas General Land Office (GLO), Texas Parks and Wildlife Department (TPWD), and Texas Department of Criminal Justice (TDCJ) Boards for Lease adopt amendments to §201.6 relating to Lessee Responsibility. The amendments are adopted without changes to the proposal as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5889) and will be not be republished.

BACKGROUND, REASONED JUSTIFICATION, AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted amendments is to clarify the rules, to change certain permissive rules to mandatory rules and to conform the rules to other existing rules located in Chapter 201. The adopted amendments will enable the GLO to administer the board for lease rules more concisely, fairly and efficiently.

The adopted amendment to §201.6(i) clarifies when GLO staff approval for surface commingling is required. The adopted amendment to §201.6(m) permit the use of full well stream meters in lieu of separators with the submittal of appropriate data and the approval of GLO staff.

FISCAL IMPACTS

Larry Laine, Chief Clerk/Deputy Land Commissioner has determined that for each year of the first five years the adopted amendments will be in effect, there will be no fiscal implications for state government as a result of enforcing or administering the readoption and amendments. Larry Laine does not anticipate incurring any additional costs as a result of administering the adopted rule amendments. Larry Laine has determined that there will be no fiscal implications for local governments.

PUBLIC BENEFIT/COST ANALYSIS

Larry Laine has determined that for each year of the first five years the amendments are adopted to be in effect, the public benefit will be improved operation of the GLO and better conservation of state resources.

SMALL BUSINESS ANALYSIS

Larry Laine has determined that there may be some economic cost to small businesses, micro-businesses, and individuals based on the adopted amendments. The total costs for an individual, small business, or micro-business associated with compliance will vary depending on the different situations and choices made by each individual, small business, or micro-business. Further, the GLO does not have information on these businesses' gross receipts, sales revenues, or labor costs. Therefore, the GLO is not able to determine the exact cost of compliance.

EMPLOYMENT IMPACT

Larry Laine does not anticipate any employment impact as a result of administering the adopted rule amendments.

PUBLIC COMMENT

The GLO did not receive any comments on the proposed amendments.

STATUTORY AUTHORITY

Chapter 34 of the Texas Natural Resources Code at §34.065.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905383

Trace Finley
Deputy Commissioner, Policy and Governmental Affairs, General Land Office
Boards for Lease of State-Owned Lands
Effective date: December 10, 2009
Proposal publication date: August 28, 2009
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.572, §3.577

The Comptroller of Public Accounts adopts the repeal of §3.572, concerning 1992 transition and §3.577, concerning credit for sales tax paid on property used in manufacturing, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6839). These sections are being repealed as they apply only to reports that are beyond the statute of limitations. The adopted repeals are a result of a rules review of Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter V, conducted by the comptroller. The rules review was performed under Government Code, §2001.039, and concluded that these sections are now obsolete.

No comments were received regarding adoption of the repeal.

The repeals are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 34.

The repeals implement Government Code, §2001.039, which authorizes a state agency to repeal rules that are no longer necessary as a result of a rule review performed under that section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2009.

TRD-200905279
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 6, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 475-0387

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CHAPTER 13. UNCLAIMED PROPERTY REPORTING AND COMPLIANCE

34 TAC §§13.16 - 13.19

The Comptroller of Public Accounts adopts new §13.16, concerning applicability; §13.17, concerning definitions; §13.18, concerning provisions of information to the comptroller; and §13.19, concerning limitations, without changes to the proposed text as published in the October 2, 2009, issue of the Texas Register (34 TexReg 6840). The new sections are necessary to implement Senate Bill 1589, 81st Legislature, 2009, and to better enable the comptroller's office and the Department of Public Safety, Employees Retirement System, Teacher Retirement System, and Texas Workforce Commission to share information and identify persons who are entitled to unclaimed property.

Senate Bill 1589 creates a process by which the Department of Public Safety, Employees Retirement System, Teacher Retirement System, and Texas Workforce Commission will share certain information with the comptroller's office in an effort to identify persons that are entitled to unclaimed property reported to the comptroller. Senate Bill 1589 requires the comptroller to adopt rules regarding the format in which the information shall be provided to the comptroller by the relevant agencies.

No comments were received regarding adoption of the new rules.

The new rules are authorized under Government Code, §§411.0111, 811.010 and 821.010, and Labor Code, §301.086, which requires the comptroller to develop rules regarding the sharing of information with the comptroller to aid in indentifying persons entitled to unclaimed property held with the comptroller.

The new rules implement Government Code, §§411.0111, 811.010 and 821.010, and Labor Code, §301.086.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2009.

TRD-200905301
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 7, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 15. DRIVER LICENSE RULES
SUBCHAPTER A. LICENSING REQUIREMENTS

37 TAC §15.5, §15.7

The Texas Department of Public Safety (the Department) adopts amendments to §15.5 and §15.7, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5327).

Adoption of amendments to the sections is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the Department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905424
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: December 13, 2009
Proposal publication date: August 7, 2009
For further information, please call: (512) 424-5848

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37 TAC §15.8

The Texas Department of Public Safety (the Department) adopts the repeal of §15.8, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5328).

Adoption of the repeal of §15.8 is necessary as Subchapter D of the Transportation Code provides for the classification of driver licenses.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905433
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: December 13, 2009
Proposal publication date: August 7, 2009
For further information, please call: (512) 424-5848

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SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §§15.21 - 15.23, 15.25 - 15.31, 15.33 - 15.40, 15.42, 15.44, 15.48

The Texas Department of Public Safety (the Department) adopts amendments to §§15.21 - 15.23, 15.25 - 15.27, 15.29 - 15.31, 15.33 - 15.40, 15.42, 15.44, and 15.48, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5329) and will not be republished. Section 15.28 is adopted with changes and will be republished. Changes were made to §15.28(f) to correct a citation which was listed in error.

Adoption of amendments to the sections is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

§15.28. Minor's Restricted Driver License Application.

(a) A minor's authorization certificate for licensing privileges is obtained by submitting a minor's restricted driver license application to the department establishing the necessity for a minor age 15-18 to drive under the provisions set out in Texas Transportation Code, §521.223. Such applications may be obtained from any Texas Department of Public Safety office or by writing the Texas Department of Public Safety, Customer Service, Box 4087, Austin, Texas 78773-0370, or online at www.txdps.state.tx.us.

(b) Persons applying for a driver's license under the provisions of Texas Transportation Code, §521.223, must provide evidence of:

(1) completion of a driver training course approved by the department; and

(2) an unusual economic hardship that is affecting the applicant's family to the extent of being denied the basic necessities for existence. Persons who can meet the criteria in subparagraphs (A) - (H) of this paragraph will be considered for licensing under the unusual economic hardship provisions.

(A) The applicant is married and maintaining a separate household apart from the parent or guardian.

(B) The applicant is the head of a household other than as a married person.

(C) The applicant has dependent children and must drive to ensure the welfare of the children.

(D) The applicant is the only person eligible for a driver's license in the household.

(E) The applicant is the only person eligible for a driver's license other than the head of the household and when the head of the household is absent from the residence for sustained periods of time due to work and it is not practical to return home each day and licensing of the applicant is necessary to sustain the household.

(F) The applicant attends school and must work to provide the basic necessities for existence of the family and the transporting of the applicant would create a hardship on the applicant's family if other family members must be absent from their employment to transport the applicant to or from work and other means of transportation are not available.

(G) The applicant needs transportation to and from school and school bus or public transportation is not provided or unavailable. Travel to participate in school activities such as sports, band, etc., will not be considered a sufficient reason to establish an unusual economic hardship.

(H) The applicant is engaged in farm or ranch work for parents or guardian and driving by the applicant is necessary in order for the family to carry on essential farming or ranching activity which is the primary source of family income.

(3) a sickness or illness of a family member that makes driving by the applicant necessary in order to provide medical attention to such family member and no other practical means to do so are available or licensing of the applicant is necessary to sustain the household because of such family member's physical condition. Person applying for a license under this provision must present a signed statement from the attending physician attesting to the fact that the family member in question should not drive because of the medical condition. Such statement must include the nature of the illness.

(4) enrollment in a vocational education program by presenting certification from the school principal attesting to enrollment of the applicant and the course is approved under the Texas Education Code, §21.101, and the course is recognized by the school for academic credit and that driving by the applicant is necessary to pursue such program.

(c) Applicants for a driver's license under the provisions of Texas Transportation Code, §21.223, must present evidence of:

(1) an economic emergency that is of such a nature that immediate relief is necessary to prevent the applicant's family from being denied the basic necessities for existence. Those conditions applicable to unusual economic hardship under subsection (b)(2) of this section also apply to economic emergency.

(2) a family illness or disability that is of such a nature that licensing of the applicant is necessary to provide a family member with transportation to receive medical attention or to sustain the household. The applicable requirements for sickness or illness under subsection (b)(3) of this section also apply to family illness or disability.

(3) a death of an immediate family member makes temporary driving by the applicant necessary to provide relief to the applicant's immediate family in carrying on routine or special family needs because of such death.

(d) Fourteen-year-old applicants applying for authority to enroll in an approved driver training course under the provisions of Texas Transportation Code, §521.223, must present evidence as required of applicants under subsection (b)(2), (3), or (4) of this section. Applicants approved for early enrollment authority may only be enrolled in the classroom portion of the driver training program.

(e) The department may require evidence or conduct an investigation for the purpose of confirming information furnished on any application for a driver's license or early enrollment authority under Texas Transportation Code, §521.223.

(f) The driver training course referred to in Texas Transportation Code, §521.223, must conform to 19 TAC §§176.1001 - 176.1019 concerning Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools and/or §§31.1 - 31.6 of this title (relating to Standards for an Approved Motorcycle Operator Training Course).

(g) Minors restricted driver license application must be executed by an authorized adult in behalf of a minor with the adult and the minor signing the form and presenting it in person at a driver's license office.

(h) Only a parent, guardian, or person having custody of a minor may make application in his behalf, or if such minor has no parent, guardian, or custodian, then an employer or county judge may apply in behalf of the minor.

(i) The minor's authorization must be presented within 45 days after approval as the required authorization for the minor to be given a driver's license examination, except 14-year-old applicants applying for early enrollment in a driver education class.

(j) Any restriction approved on the minor's restricted driver's license application by the department or by court order, and found by the department to be necessary and not in conflict with the original authorization or court order, must be added to the license. Restrictions will normally be the time frame and area necessary to relieve a hardship or emergency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 2009.

TRD-200905425
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: December 13, 2009
Proposal publication date: August 7, 2009
For further information, please call: (512) 424-5848

37 TAC §15.41, §15.47

The Texas Department of Public Safety (the Department) adopts the repeal of §15.41 and §15.47, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5333).

Adoption of repeal of §15.41 is necessary as the voter registration form is now an automated process in the driver license system. Adoption of repeal of §15.47, specific to the electronically readable information on the magnetic stripe of a driver license, commercial driver license, or identification card, is necessary as §521.126 of the Transportation Code provides for the provisions of electronically readable information on a driver license or identification card.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to

adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200905434
Stuart Platt
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER C. EXAMINATION REQUIREMENTS

37 TAC §§15.52, 15.54, 15.56, 15.59

The Texas Department of Public Safety (the Department) adopts amendments to §§15.52, 15.54, 15.56, and 15.59, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5333).

Adoption of amendments to the sections is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER D. DRIVER IMPROVEMENT

37 TAC §§15.81 - 15.83, 15.85, 15.87

The Texas Department of Public Safety (the Department) adopts amendments to §§15.81 - 15.83, 15.85, and 15.87, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5335).

Adoption of amendments to the sections is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. RECIPROCITY IN DRIVER LICENSING

37 TAC §§15.91 - 15.93

The Texas Department of Public Safety (the Department) adopts amendments to §§15.91 - 15.93, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5336).

Adoption of amendments to the sections is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued. Additionally, §15.91 is reformatted in order to allow for revisions regarding the nations to which the department has obtained a license reciprocal agreement.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. REGULATIONS IN MAINTAINING DRIVER RECORDS

37 TAC §15.101

The Texas Department of Public Safety (the Department) adopts amendments to §15.101, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5340).

Adoption of amendments to the section is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver," "accident" to "crash" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER G. DENIAL OF RENEWAL OF DRIVER'S LICENSE FOR FAILURE TO APPEAR FOR TRAFFIC VIOLATION

37 TAC §15.111, §15.112

The Texas Department of Public Safety (the Department) adopts the repeal of §15.111 and §15.112, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5341).

Adoption of the repeal of §15.111, specific to the purpose and scope for the renewal of driver license for failure to appear for traffic violations, is necessary as provisions regarding purpose and scope may be found in Texas Transportation Code, Chapter 706. Repeal of §15.112, specific to the Authority to Enter Interlocal Contract for services of denying the renewal of driver's license for failure to appear for traffic violation, is necessary as these provisions may be found in Texas Transportation Code, Chapter 706.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER G. DENIAL OF RENEWAL OF DRIVER LICENSE FOR FAILURE TO APPEAR FOR TRAFFIC VIOLATION

37 TAC §15.113, §15.114

The Texas Department of Public Safety (the Department) adopts amendments to §15.113 and §15.114, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5342).

Adoption of amendments to the section is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver," "accident" to "crash" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER H. ADVERTISING

37 TAC §15.131

The Texas Department of Public Safety (the Department) adopts amendments to §15.131, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5343).

Adoption of amendments to the section is necessary in order to further align the rule with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver," "accident" to "crash" and "instruction permit" to "learner license."

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER J. DRIVER RESPONSIBILITY PROGRAM

37 TAC §15.163

The Texas Department of Public Safety (the Department) adopts amendments to §15.163, concerning Driver License Rules, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5343).

Adoption of amendments to the section is necessary in order to further align the rules with existing statute and to repeal rules addressed in statute. Terms have been modified to align with industry standards, i.e., "driver's" to "driver," "accident" to "crash" and "instruction permit" to "learner license." Rule changes also provide that licenses issued by the department, including driver licenses, minor's restricted driver licenses, learner licenses, and occupational and interlock licenses will be issued with a photograph with current information being displayed on each license or identification certificate issued.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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Texas Department of Public Safety
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CHAPTER 16. COMMERCIAL DRIVER LICENSE

SUBCHAPTER A. LICENSING REQUIREMENTS, QUALIFICATIONS, RESTRICTIONS, AND ENDORSEMENTS

37 TAC §§16.3, 16.4, 16.8, 16.9, 16.11, 16.12

The Texas Department of Public Safety (the Department) adopts amendments to §§16.3, 16.4, 16.8, 16.9, and 16.11, concern-

ing Commercial Driver License, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5345) and will not be republished. Section 16.12 is adopted with changes and will be republished. Changes were made to the proposed text of §16.12 due to an editing error.

Adoption of amendments to the sections is necessary in order to address Federal Motor Carrier Safety Administration (FMCSA) findings during the 2006 review of Texas' CDL program. These amendments further align Chapter 16 rules to new and previously existing statutory requirements governing Commercial Driver License issuance procedures where FMCSA determined the statute and/or rule was not clear enough for enforcement purposes. Amendments also change the title of the chapter to "Commercial Driver License."

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

§16.12. Endorsements.

(a) T--Double/Triple Trailer (commercial driver license and noncommercial driver license). This endorsement authorizes the holder to tow more than one trailer.

(b) P--Passenger Vehicles (CDL only). This endorsement authorizes the holder to operate a vehicle which is designed to transport 16 or more passengers, including the driver.

(c) N--Tank Vehicle (CDL only). This endorsement authorizes the holder to operate a vehicle or combination of vehicles which are designed to transport any liquid or gaseous materials within a tank that is either permanently or temporarily attached to the vehicle or chassis. Such vehicles include, but are not limited to, cargo tanks and portable tanks, as defined in 49 CFR, Part 171. A CDL tank endorsement is required if the cargo tank has a bulk packaging over 119 gallons for liquids, or a water capacity greater than 1,000 pounds as a receptacle for a gas if they are permanently attached to or form a part of a motor vehicle, or is not permanently attached to a motor vehicle but which, by reason of its size, construction or attachment to a motor vehicle is loaded or unloaded without being removed from the motor vehicle and is not built to the specifications for cylinders, or portable tanks. A portable tank is defined as a bulk packaging (except a cylinder having a water capacity of 1,000 pounds or less) designed primarily to be loaded onto, or on or temporarily attached to a transport vehicle and equipped with skids, mounting, or accessories to facilitate handling of the tank by mechanical means. A portable tank that meets the bulk packaging definition described in this subsection requires a CDL with a tank endorsement. However, this definition does not include portable tanks having a rated capacity under 1,000 gallons.

(d) H--Hazardous Materials (CDL only). This endorsement authorizes the holder to operate a vehicle or combination of vehicles which are required to be placarded under the Hazardous Materials Transportation Act (49 USC §1801 et seq.).

(e) S--School Bus (CDL only). This endorsement authorizes the holder to operate a school bus.

(f) X--Combination of N and H (CDL only). This endorsement is used to combine the endorsements N and H.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER B. APPLICATION REQUIREMENTS AND EXAMINATIONS

37 TAC §§16.34, 16.47, 16.48, 16.50, 16.51

The Texas Department of Public Safety (the Department) adopts amendments to §§16.34, 16.47, 16.48, 16.50, and 16.51, concerning Commercial Driver License, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5349).

Adoption of amendments to the sections is necessary in order to address Federal Motor Carrier Safety Administration (FMCSA) findings during the 2006 review of Texas' CDL program. These amendments further align Chapter 16 rules to new and previously existing statutory requirements governing Commercial Driver License issuance procedures where FMCSA determined the statute and/or rule was not clear enough for enforcement purposes.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER C. CHANGE OF LICENSE STATUS, RENEWALS, SURRENDER OF LICENSE, FEES

37 TAC §§16.71 - 16.73, 16.75

The Texas Department of Public Safety (the Department) adopts amendments to §§16.71 - 16.73 and 16.75, concerning Com-

mercial Driver License, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5352).

Adoption of amendments to the sections is necessary in order to address Federal Motor Carrier Safety Administration (FMCSA) findings during the 2006 review of Texas' CDL program. These amendments further align Chapter 16 rules to new and previously existing statutory requirements governing Commercial Driver License issuance procedures where FMCSA determined the statute and/or rule was not clear enough for enforcement purposes.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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SUBCHAPTER D. SANCTIONS AND DISQUALIFICATIONS

37 TAC §16.91

The Texas Department of Public Safety (the Department) adopts the repeal of §16.91, concerning Noncommercial Motor Vehicle Permits, without changes to the proposal as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5353).

Adoption of the repeal is necessary to further align licensing requirements with federal recommendations governing commercial drivers. All commercial drivers who are disqualified from operating a commercial motor vehicle are required to surrender their commercial driver license for the issuance of a non-commercial driver license containing a photograph.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
General Counsel
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37 TAC §§16.99, 16.103 - 16.105

The Texas Department of Public Safety (the Department) adopts amendments to §§16.99 and 16.103 - 16.105, concerning Commercial Driver License, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5353).

Adoption of amendments to the sections is necessary in order to address Federal Motor Carrier Safety Administration (FMCSA) findings during the 2006 review of Texas' CDL program. These amendments further align Chapter 16 rules to new and previously existing statutory requirements governing Commercial Driver License issuance procedures where FMCSA determined the statute and/or rule was not clear enough for enforcement purposes.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
General Counsel
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CHAPTER 18. DRIVER EDUCATION

SUBCHAPTER A. COMMERCIAL DRIVER TRAINING SCHOOL TESTING AND ISSUANCE OF LEARNER LICENSE

37 TAC §§18.1 - 18.4

The Texas Department of Public Safety (the Department) adopts amendments to §§18.1 - 18.4, concerning Commercial Driver Training School Testing and Issuance of Learner License, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5355).

Adoption of the first amendment is necessary to change the title of the subchapter. Adoption of additional amendments is made

to reduce the processes and paperwork required for the issuance of learner licenses. Modification is also made to the rules to change the term "instruction permit" to "learner license" and to align additional terms with industry standards, i.e., "driver's" to "driver."

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
General Counsel
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SUBCHAPTER B. PARENT TAUGHT DRIVER EDUCATION

37 TAC §§18.21 - 18.25

The Texas Department of Public Safety (the Department) adopts amendments to §§18.21 - 18.25, concerning Parent Taught Driver Education, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5358).

Adoption of these amendments is made to reduce the processes and paperwork required for the issuance of learner licenses. Modification is also made to the rules to change the term "instruction permit" to "learner license" and to align additional terms with industry standards, i.e., "driver's" to "driver."

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.165.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stuart Platt
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 101. ADMINISTRATIVE RULES AND PROCEDURES

SUBCHAPTER J. APPEALS AND HEARING PROCEDURES

DIVISION 4. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

40 TAC §101.8059

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), adopts amendments to the DARS rules in Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapter J, Appeals and Hearing Procedures, Division 4, Office for Deaf and Hard of Hearing Services, §101.8059, Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate. The rule is adopted without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6844) and will not be republished.

DARS adopts §101.8059 to provide clarification and necessary expansion of the grounds for denying, revoking, or suspending an interpreter application or certificate, or otherwise disciplining a certificate holder, including grounds relating to failure to disclose criminal convictions and to provide requested documentation and information to the department.

No comments were received regarding adoption of the rule.

The amendment is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code §531.033 and §2155.144, which grant HHSC the authority to promulgate rules for the acquisition of goods and services, and Texas Government Code §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), adopts proposed amendments to the DARS rules in Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services, by amending Subchapter A, General Rules, §109.101, Definitions; by renaming the title of Subchapter B; and by amending Subchapter B, Board for Evaluation of Interpreters and Interpreter Certification (renamed "Board for Evaluation of Interpreters (BEI) General Certificate or Certification"), §109.227, Certification. In addition, DARS also adopts new rule §109.228, Qualifications and Requirements for Board for Evaluation of Interpreters (BEI) General Certificate or Certification, of Subchapter B; and adopts new Subchapter E, Certified Trilingual Interpreters, with new §109.501, Qualifications and Requirements for Trilingual Certification, and new §109.503, Disciplinary Actions, Complaints, and other Conditions Impacting the Validity of a Trilingual Certification. The rules are adopted without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6845) and will not be republished.

Specifically, DARS adopts amendments to §109.101 to clarify existing definitions and to add definitions necessary to provide proper understanding of the program rules associated with DARS' interpreter certifications program; and amendments to §109.227 to add a new subsection that provides notice that DARS will conduct criminal conviction records check for all applicants and current certificate holders to determine eligibility to become certified or to maintain certification. In addition, DARS is adopting new §109.228, §109.501, and §109.503, to clarify the qualifications for DARS' BEI General Certification and to promulgate rules for its new Trilingual Certification.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. GENERAL RULES

40 TAC §109.101

The amendments are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code §531.033 and §2155.144, which grant HHSC the authority to promulgate rules for the acquisition of goods and services, and Texas Government Code §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
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SUBCHAPTER B. BOARD FOR EVALUATION OF INTERPRETERS (BEI) GENERAL CERTIFICATE OR CERTIFICATION

40 TAC §109.227, §109.228

The new rule and amendment are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code §531.033 and §2155.144, which grant HHSC the authority to promulgate rules for the acquisition of goods and services, and Texas Government Code §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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SUBCHAPTER E. CERTIFIED TRILINGUAL INTERPRETERS

40 TAC §109.501, §109.503

The new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code §531.033 and §2155.144, which grant HHSC the authority to promulgate rules for the acquisition of goods and services, and Texas Government Code §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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Sylvia F. Hardman
General Counsel
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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

The Texas Department of Transportation (department) adopts amendments to §1.2, Texas Department of Transportation, and §1.4, Public Access to Commission Meetings, all concerning management of the department. The amendments to §1.2 are adopted with changes to the proposed text as published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6299). Section 1.4 is adopted without changes and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The legislature's enactment of Senate Bill (S.B.) 970, 81st Legislature, Regular Session, 2009, and the commission's adoption of a regionalization plan for the department require changes to rules of the Texas Transportation Commission (commission) relating to the management of the department.

Amendments to §1.2, Texas Department of Transportation, change the qualifications of the executive director of the department contained in subsection (a)(1) to conform to the changes made by S.B. 970, which removed the requirements that the executive director be a registered professional engineer and be skilled in construction and maintenance and added the requirement of organizational management skills.

The amendments to §1.2 also add new subsection (e), which recognizes the consolidation of the operational and project development functions of the department's districts into four regional support centers. The creation of the regional support centers is a part of the implementation of the regionalization plan approved by the commission during its March 26, 2009 meeting, Minute Order 111738. The amendments redesignate existing subsection (e) as subsection (f). For grammatical and style consistency, a minor change was made from the proposed version of §1.2(f) by removing the word "The" at the beginning of the catchline.

Amendments to §1.4(f), Notice, clarify that notice of commission meetings are filed with the Office of the Secretary of State rather than with the *Texas Register.* The Office of the Secretary of State currently publishes open meeting notices on the Secretary's website rather than in the *Texas Register.*

COMMENTS

No comments on the proposed amendments were received.

SUBCHAPTER A. ORGANIZATION AND RESPONSIBILITIES

43 TAC §1.2

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §201.301(a).

§1.2. Texas Department of Transportation.

(a) Executive director.

(1) The commission will elect an executive director for the department who shall be skilled in transportation planning and development and in organizational management. The executive director, as the chief executive officer of the department, is authorized to administer the day-to-day operations of the department. The executive director may hold that position until removed by the commission.

(2) To assist in discharging the duties and responsibilities of the executive director, the executive director may organize, appoint, and retain such administrative staff as he or she deems appropriate.

(3) The executive director shall:

(A) serve the commission in an advisory capacity, without vote;

(B) submit quarterly, annually, and biennially to the commission detailed reports of the progress of public road construction, public and mass transportation development, and detailed statement of expenditures;

(C) hire, promote, assign, re-assign, transfer, and, consistent with applicable law and policy, terminate staff necessary to accomplish the roles and missions of the department;

(D) notify the chair of grounds for removal of a commissioner if the executive director knows that a potential ground for removal exists, or, if the potential ground for removal relates to the chair, notify another commissioner;

(E) under the direction and with the approval of the commission, prepare a comprehensive plan providing a system of state highways; and

(F) perform other responsibilities as required by law or assigned by the commission.

(4) The executive director may, consistent with applicable law, delegate one or more of the functions listed under paragraph (3)(B) - (F) of this subsection to the staff of the department.

(b) Department staff. The staff of the Texas Department of Transportation, under the direction of the executive director, is responsible for:

(1) implementing the policies and programs of the commission by:

(A) formulating and applying operating procedures; and

(B) prescribing such other operating policies and procedures as may be consistent with and in furtherance of the roles and missions of the department;

(2) providing the chair and commissioners administrative support necessary to perform their respective duties and responsibilities, including:

(A) assigning staff to assist commissioners;

(B) providing necessary office space and equipment;

(C) furnishing in-house legal counsel;

(D) providing all information and documents necessary for the commission to effectively perform its responsibilities; and

(E) preparing an agenda under the direction of the chair, providing notice, and transcribing commission meetings and hearings as required by the Texas Open Meetings Act, Government Code, Chapter 551; and

(3) performing all other duties as prescribed by law or as assigned by the commission.

(c) Divisions. Consistent with commission direction provided under §1.1(b)(1)(T) and (U) of this subchapter, the executive director shall organize the department into headquarters operating divisions and offices reflecting the various functions and duties assigned to the department, and shall designate a division or office director who shall administer each division or office.

(d) Districts.

(1) District office. The department is divided into geographical districts, each containing one district office. Each district is administered by a district engineer who is a registered professional engineer and is appointed by the executive director.

(2) Area office. A district contains one or more area offices, each of which is responsible for carrying out the department's primary functions at the local level for a designated geographical area. Each area office is normally administered by an area engineer who shall be a registered professional engineer.

(3) Project office. A district may contain one or more project offices, which is normally responsible for a specific project within an area.

(e) Regional Support Centers. The department has four regional support centers, which provide operational and project development support functions to the districts. The regional support centers are located in Fort Worth, Houston, San Antonio, and Lubbock.

(f) Automobile Burglary and Theft Prevention Authority. The Automobile Burglary and Theft Prevention Authority (authority) is an independent authority within the department. The authority undertakes a variety of programs designed to reduce thefts of motor vehicles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905366
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 10, 2009
Proposal publication date: September 11, 2009
For further information, please call: (512) 463-8683

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SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS

43 TAC §1.4

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §201.301(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §§1.82, 1.84, 1.85

The Texas Department of Transportation (department) adopts amendments to §1.82, Statutory Advisory Committee Operations and Procedures, §1.84, Statutory Advisory Committees, and §1.85, Department Advisory Committees, all concerning department advisory committees. The amendments to §§1.82, 1.84, and 1.85 are adopted in conjunction with the proposed repeal of §24.13, relating to corridor planning and development. The amendments to §§1.82, 1.84, and 1.85 are adopted without changes to the proposed text as published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6301) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The adopted amendments are the result of procedural changes by the Office of the Secretary of State relating to the publication of meeting notices, the Texas Transportation Commission's (commission) review of the need to continue the existence of the commission's advisory committees, and changes made by House Bill (H.B.) 2219, 81st Legislature, Regular Session, 2009, concerning the Public Transportation Advisory Committee.

Amendments to §1.82, Statutory Advisory Committee Operations and Procedures, subsection (c)(1), require that notice of advisory committee meetings be filed with the Office of the Secretary of State for publication on the Secretary's Internet website rather than having the notice published in the *Texas Register.* This change complies with the Office of the Secretary of State's current practice of publishing open meeting notices on the Secretary's website rather than in the *Texas Register.*

Amendments to subsection (i) of §1.82 revise the sunset dates of commission advisory committees that are created by statute. Section 1.82 currently provides that each statutory advisory committee is abolished December 31, 2009. This sunset date was established under Government Code, §2110.008, which authorizes a state agency to establish by rule a date on which advi-

sory committees will automatically be abolished unless continued. The commission determines that the continued existence of its statutory advisory committees are necessary for improved communication between the department and the public. Therefore, §1.82(i) is amended to revise the sunset date to December 31, 2011.

Amendments to §1.84, Statutory Advisory Committees, subsection (b)(2), remove the provisions relating to the terms and removal of the members of the Public Transportation Advisory Committee. H.B. 2219, made several changes relating to the Public Transportation Advisory Committee, including the selection of members of the committee by the governor, lieutenant governor, and speaker of the house rather than by the commission. Under H.B. 2219 members of the committee no longer serve fixed terms and may be removed only by the appointing officer.

Amendments to §1.85, Department Advisory Committees, revise the sunset date of advisory committees created by the commission. Section 1.85 provides for the creation and operating procedures of advisory committees of the commission that are not created by statute. Subsection (c) currently provides that each advisory committee created under §1.85 is abolished December 31, 2009. This sunset date was established in accordance with Government Code, §2110.008. The commission determines that each existing advisory committee created under §1.85 is necessary for improved communication between the department and the public. Therefore, §1.85(c) is amended to revise the sunset date to December 31, 2011.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, §551.048, Government Code, Chapter 2110, and Transportation Code, §455.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
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Texas Department of Transportation
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CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) adopts new §21.24, State Participation in Gas Pipeline Relocations; amendments to §21.31, Definitions, §21.33, Applicability, §21.34, Scope, §21.36, Rights of Utilities, §21.37, Design; and new §21.42, Appeal Process, all concerning the installation and adjustment of utility facilities in state highway rights of way. The amendments to §21.33 and §21.34 are adopted without changes to the proposed text as published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6304) and will not be republished. New §21.24, the amendments to §§21.31, 21.36, and 21.37, and new §21.42 are adopted with changes to the proposed text as published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6304).

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTIONS

Title 43, Texas Administrative Code (TAC), Chapter 21, Subchapter B, Utility Adjustment, Relocation, or Removal, was adopted to prescribe requirements for the adjustment, relocation, and removal of utility facilities on the state highway system and provide for reimbursement for the costs of that work in accordance with Transportation Code, Chapter 203, Subchapter E. Similarly, Title 43, TAC Chapter 21, Subchapter C, Utility Accommodation, was adopted to prescribe minimum requirements for the accommodation, method, materials, and location for the installation, adjustment, and maintenance of public and private utilities within the right for way for the state highway system. House Bill 2572, 81st Legislature, Regular Session, 2009, amended Utilities Code, §181.005 and authorized gas corporations to lay and maintain gas pipelines along public roads, subject to certain conditions relating to compliance with Railroad Commission of Texas safety regulations, state and federal regulations regarding the accommodation of utility facilities, and limitations on state reimbursement for the cost of pipeline relocations caused by highway improvement projects. The proposed amendments and new sections are necessary to comply with the provisions of HB 2572 and clarify existing language.

New §21.24, establishes a procedure for determining the circumstances under which the department must reimburse a gas corporation for the adjustment, modification, relocation, or removal of the gas corporation's pipeline made necessary by an improvement to a state highway. House Bill 2572 creates a distinction among different types of gas corporations and, except for pipelines located on land in which the gas corporation has a property interest, authorizes the state to reimburse the cost of adjusting only those gas pipelines that are owned or operated by a gas utility, as defined under Utilities Code, §181.021, or a common carrier subject to the Natural Resources Code, Chapter 111. Prior to the enactment of HB 2572, those two types of entities were already authorized to locate gas pipelines longitudinally on a state highway right of way, and the department, under Transportation Code, §203.092, was authorized to reimburse a gas utility and a common carrier for the cost of adjustment required by improvement of interstate highway or toll highway projects. Although Utilities Code, §181.005, as amended by HB 2572, increases the types of gas corporations that may locate their gas pipelines longitudinally on a state highway right of way, the additional authorized gas corporations are not entitled to state reimbursement under Transportation Code, §203.092 on interstate highway or toll highway projects.

New §21.24(a) clarifies that the limitation on reimbursement only applies to a gas pipeline owned or operated by a gas corporation authorized to act under Utilities Code, §181.005 that is located longitudinally on a state highway right of way. If the gas pipeline crosses the right of way, but is not located longitudinally, the lim-

itation described in §21.24(b) does not apply and eligible costs would be entitled to reimbursement.

New §21.24(b) describes the general rule that the adjustment of a gas pipeline will be at the sole expense of the gas corporation. It then sets out two exceptions: (1) the owner or operator of the gas corporation pipeline has a private property interest in the land occupied by the pipeline that is adjusted, or (2) the gas corporation pipeline is owned or operated by a gas utility as defined in Utilities Code, §181.021, or a common carrier subject to the Natural Resources Code, Chapter 111, and also meets the requirements of Transportation Code, §203.092. This is a restatement of the statutory language in Utilities Code, §181.005.

New §21.24(c) establishes department procedure for making a determination that state reimbursement for the cost of adjusting a gas pipeline is authorized. The requesting pipeline owner or operator must provide: (1) a written certification that it is a gas utility or common carrier that qualifies for reimbursement under Utilities Code, §181.005; and (2) documentation issued by the Railroad Commission of Texas that substantiates that it is a gas utility or common carrier as described in subsection (b). The information required by this new subsection will enable the department to exercise due diligence in making a decision to reimburse the owner or operator. Revisions to new §21.24 are addressed in the COMMENTS section of this preamble.

Amendments to §21.31(4) delete the word "utilities" and replace it with the words "utility facilities" in the definition of "As-Built plans." This change clarifies that the definition relates to the actual lines, pipelines, conduits, cables, and their appurtenances rather than the entity that owns the utility facilities.

Amendments to §21.31(8) add the word "facility" in the definition of "Certified as-installed construction plans." This change clarifies that the definition relates to the actual lines, pipelines, conduits, cables, and their appurtenances rather than the entity that owns the utility facilities.

Amendments to §21.31(11) delete the word "utilities" and replace it with the words "utility facilities" in the definition of "Conduit." This change clarifies that the definition relates to the actual lines, pipelines, cables, and their appurtenances rather than the entity that owns the utility facilities.

A definition of "Director" is added as new §21.31(16). It identifies the chief administrative officer in charge of the Maintenance or Right of Way Divisions, or any successor divisions, as the director. There is no current definition for this term and it is important to clearly identify the person responsible for authorizing exceptions under 43 TAC §21.35 and determining appeals under new 43 TAC §21.42.

Subsequent definitions following new §21.31(16) are renumbered for consistency and clarity.

A definition of "Engineering study" is added as new §21.31(22). It refers to an engineering analysis that determines the expected impact that permitting vehicular access will have on mobility, safety, and the efficient operation of the state highway system. Use of the term is necessary for describing the conditions of establishing a utility strip under amended 43 TAC §21.31(b)(8).

Amendments to renumbered §21.31(23) add the words "or that officer's designee not below the level of assistant executive director" to the definition of "Executive director." This addition allows the executive director to expedite the decision making process by delegating responsibilities exercised under 43 TAC, Chapter 21, Subchapter C to other upper level administration employees in the department.

Amendments to renumbered §21.31(26) add the words "a" and "utility" to clarify the nature of the lines governed by the subchapter and delete the words "and is private in function and does not directly or indirectly serve the public." The change to the definition of "Gathering line" is necessary to be consistent with the expanded authority of gas corporations to place different types of gas pipelines along state highway right of way under Utilities Code, §181.005. A gathering line that is operated by a gas corporation is no longer automatically considered to be a private line. Revisions to §21.31(26) are addressed in the COMMENTS section of this preamble.

Renumbered §21.31(39) is completely revised. Instead of the current definition of "Private utility," which focuses on the exclusive private nature of the particular lines, pipelines, conduits, cables, and their appurtenances, the new definition focuses on the nature of the utility's business. A private utility is now considered to be any business that is not a public utility as defined in renumbered 43 TAC §21.31(40). A public utility is a business that is authorized by state law to place its facilities longitudinally in state highway right of way. The change is necessary to be consistent with the expanded authority of gas corporations to place different types of gas pipelines along state highway right of way under Utilities Code, §181.005.

Amendments to renumbered §21.31(40) delete the words "for public consumption" and replace them with the words "which directly or indirectly serves the public and that is authorized by state law to operate, construct, and maintain its facilities over, under, across, on, or along highways," and in addition, add the words "that is" and "producing." This expanded definition of "Public utility" more accurately describes the legal standard for determining those types of utilities that are authorized to place utility facilities longitudinally in state highway right of way. The terms "public utility" and "private utility" are used in the context of authorizing longitudinal placement. Revisions to proposed §21.31(40) are addressed in the COMMENTS section of this preamble.

A definition of "Traffic impact analysis" is added as new §21.31(46). It refers to a specific type of engineering study that determines the potential current and future traffic impacts of a proposed traffic generator on the state highway system. The traffic impact analysis must be signed, sealed, and dated by an engineer licensed to practice in the state of Texas. Use of the term is necessary for describing the conditions of establishing a utility strip under 43 TAC §21.31(b)(8).

Amendments to renumbered §21.31(50) add the words "communication controller boxes and pedestals, electric boxes" to the definition of "Utility appurtenances." The change gives more examples of a utility appurtenance to clarify that it is an inclusive term that covers all types of utility facilities.

Amendments to renumbered §21.31(51) add the word "utility" to the definition of "Utility facilities". The word was mistakenly omitted in the original text and its addition clarifies the reference to lines, pipelines, conduits, cables, and their appurtenances that carry a utility product.

As a result of comments received, a definition of "Utility product" is added as new §21.31(52). It identifies a commodity such as water, steam, electricity, gas, oil, or crude resources or communications, cable television, or waste disposal services that directly or indirectly serves the public. There is no current defini-

tion for this term and it is important to clearly identify the types of product that are transported or distributed through utility facilities by entities authorized to use highway right of way under 43 TAC §21.31(40) and §21.36. This new definition is discussed further in the COMMENTS section of this preamble.

Amendments to the definition of "utility strip" in renumbered §21.31(53) delete the words "border width, where an assignment may be designated for a utility delineating the area of" and replace it with the following phrase: "area between the outer traveled way and the right of way line, for the nonexclusive use, occupancy, and access by one or more authorized public utilities." The change describes the area covered by the previously undefined term "border width," and clarifies that a utility strip may contain more than one utility facility.

Proposed renumbered definition §21.31(53), "Utility structure," is renumbered to definition §21.31(54).

Amendments to §21.33(d) include three changes. The first change deletes the words "or designee." Since the definition of "district engineer" already includes the district engineer's designee, the reference in this section is redundant. The other changes to §21.33(d) clarify that a special district requirement on a specific installation or adjustment of a utility facility is classified as a supplemental accommodation requirement and, if stricter than the minimum requirements of 43 TAC, Chapter 21, Subchapter C, must be detailed in writing.

Amendments to §21.34 include two changes. The first change concerns the effect of other conflicting law on the enforcement of regulations contained in Subchapter C. The existing discussion on the effect of other laws is too general and ambiguous. It does not specify the type of applicable law and implies that a conflict results in the entire subchapter being superseded. The amended language clarifies that only other federal or state law (excluding municipal ordinances and county orders) can cause a conflict, and provides that the higher degree of federal or state law protection applies only to the particular issue. Further changes to §21.34 delete references to district supplemental accommodation requirements and a utility's ability to appeal those additional district requirements. The references to district supplemental accommodation requirements are moved into 43 TAC §21.33(d) and consolidated with other special district requirements. The references to an appeal are moved into new 43 TAC §21.42 and consolidated with an expanded appeal process.

Amendments to §21.36(a) delete the word "certain" as a general modifier of the word "utilities" and replace it with the more specific and defined word "public." The word "lines" is replaced with the broader and more accurate word "facilities." These changes clarify the types of utilities that are authorized to place utility facilities longitudinally in state highway right of way and are consistent with the expanded authority of gas corporations under Utilities Code, §181.005. Revisions to §21.36(a) are addressed in the COMMENTS section of this preamble.

Amendments to §21.36(b) delete specific references to the types of "private lines" that cannot be placed longitudinally on a highway right of way and replace the language with the more precise and defined phrase "private utility." The amended language focuses on the nature of the utility's business, as opposed to the nature of the particular utility line, and is necessary to be consistent with the expanded authority of gas corporations to place different types of gas pipelines along state highway right of way under Utilities Code, §181.005.

New §21.36(c) authorizes the department to require a utility seeking to install or adjust a utility facility longitudinally within a highway right of way to provide: (1) a written certification that it is an entity authorized by state law to place its facilities along state highways, and (2) documentation issued by the applicable state regulatory agency that substantiates that the utility and its facilities are subject to public regulation. The documentation may be required by the department if the utility's legal authority for placement of its facilities longitudinally in highway right of way is not readily evident. The two listed documents provide necessary information that will assist the department in making a determination that the utility is a defined "public utility" entitled under existing law to install or adjust a utility facility longitudinally within state highway right of way. Without the state regulatory agency information, the department is not able to determine if a gas company is a "gas corporation" under Utilities Code, §181.005. Revisions to §21.36(c) are addressed in the COMMENTS section of this preamble.

New §21.37(a)(10) adds "applicable Railroad Commission of Texas safety regulations" to the list of other regulations to which utility installations must conform. The change is necessary to be consistent with the expanded authority of gas corporations to place different types of gas pipelines along state highway right of way under Utilities Code, §181.005.

Amendments to §21.37(b)(4) add the word "overhead" and delete the reference to subsection "(c)" of 43 TAC §21.41. Title 43, Chapter 21, §21.41 concerns only overhead electric and communication lines. Subsection (c) of 43 TAC §21.41 is limited to horizontal clearance, thus it is too limiting and is incorrect for the purposes of §21.37(b)(4). These changes provide the proper cross-reference and clarify the meaning of the subparagraph.

Section 21.37(b)(5) relates to a utility's responsibility to determine whether other utility lines exist at the proposed installation area. The amendments to §21.37(b)(5) delete the word "utilities" and replaces it with the words "utility facilities." This change clarifies that the subparagraph relates to the actual lines, pipelines, conduits, cables, and their appurtenances rather than the entity that owns the utility facilities.

Section 21.37(b)(6) relates to the preferred areas for a utility's access to its facility on controlled access highways or freeways. The amendments to §21.37(b)(6) delete three references to the words "utilities" and "utility" and replace them with the words "utility facilities" and "facility." These changes clarify that the subparagraph relates to the actual lines, pipelines, conduits, cables, and their appurtenances rather than the entity that owns the utility facilities. The phrase "shall not" is also replaced with "may not" to be more grammatically correct.

Amendments to §21.37(b)(7) delete the word "lines" and replace it with the broader and more accurate word "facilities." This paragraph is revised from the proposed version of the paragraph as published in the *Texas Register* to be consistent with other references in Subchapter C.

Amendments to §21.37(b)(8) retain the department's authority to establish a utility strip for longitudinal installation of a utility facility within existing access denial lines of a controlled access highway or freeway without frontage roads and add specific procedures and requirements to provide a well-defined process for this alternative.

New §21.37(b)(8)(A) requires the utility to submit a written request for the installation that includes: (i) the information re-

quired by 43 TAC §21.35; (ii) survey data to identify and designate the location of the utility strip, its relationship to the existing highway facilities and right of way line; (iii) an access plan with clearly described procedures to preserve the safety and free flow of traffic on the highway during periods of installation, maintenance, and emergency service or repair; and (iv) any additional information including an engineering study, requested by the department, that is reasonably necessary for a determination of the impact of the proposed utility facility on the controlled access highway.

New §21.37(b)(8)(B) requires the department to establish a utility strip if the utility satisfies the conditions described in 43 TAC §21.35 and §21.37(b)(8)(A). This is consistent with federal regulation 23 C.F.R. §645.209(c)(5). In establishing the utility strip, the department shall locate a utility access denial line between the proposed utility facility and the mainlanes and connecting ramps, and designate the specific area of use, occupancy, and access for installation and maintenance of the requested utility facility.

New §21.37(b)(8)(C) - (F) authorizes the department to adjust the utility access denial line of an established utility strip to accommodate any additional approved utility facilities, clarifies that the requesting utility is responsible for all costs associated with providing the information required for designation of a new or expanded utility strip, requires the utility to delineate the utility-access denial line on the ground by installing permanent markers, and retains the existing requirements of §21.37(b)(8) pertaining to the location of fences at the right of way line and the continuation of access denial regarding property adjoining the right of way line.

Section 21.37(c)(4) describes the requirements for a utility's installation plan. The amendment to §21.37(c)(4) deletes the word "utilities" and replaces it with the words "utility facilities." This change clarifies that the paragraph relates to the actual lines, pipelines, conduits, cables, and their appurtenances rather than the entity that owns the utility facilities.

New §21.42 establishes an appeal process under which a utility can contest the department's application of the accommodation requirements in 43 TAC, Chapter 21, Subchapter C. It incorporates provisions from the limited appeal process in existing 43 TAC §21.34 into a comprehensive appeal procedure that allows the utility to challenge any denial of a utility's request for the installation of a new utility facility or the adjustment or relocation of an existing utility facility. The appeal process gives the utility an opportunity to appeal a district decision first to a division director, and if not satisfied at that level, the appeal can be presented to the department's executive director, and finally relief can be requested from a board of variance. The appeal process is consistent with the requirements of Utilities Code, §181.005. Revisions to new §21.42 are addressed in the COMMENTS section of this preamble.

New §21.42(a) authorizes a utility to file a petition of appeal to contest: (1) a supplemental accommodation requirement prescribed under 43 TAC §21.33; (2) the application of a design, construction, or maintenance requirement under 43 TAC §§21.37, 21.38, 21.40, and 21.41; (3) a denial of the utility's request for an exception under 43 TAC §21.35; or (4) a denial of the utility's request for either the installation of a new utility facility or the adjustment or relocation of an existing utility facility. Revisions to new §21.42(a) are addressed in the COMMENTS section of this preamble.

New §21.42(b) requires that the petition of appeal be filed with either the director of the Right of Way Division, if the utility facility that is the subject of the appeal occupies or is proposing to occupy the right of way under a utility joint use agreement, or with the director of the Maintenance Division, if the utility facility that is the subject of the appeal occupies or is proposing to occupy the right of way under a use and occupancy agreement other than a utility joint use agreement.

New §21.42(c) requires that the petition must: (1) be in writing; (2) completely and succinctly state the grounds for appeal and its factual basis; and (3) include sufficient factual documentation, such as drawings, surveys, or photographs, to establish the merits of the appeal.

New §21.42(d) provides that the utility has the burden of proving its appeal. This subsection is revised after publication of the proposed text in the *Texas Register* to clarify the burden of proof.

New §21.42(e) requires the division director to issue, within 45 days after the date of receipt of the petition, a written decision approving or disapproving the appeal, and to immediately send the decision to the utility. If a written decision is not issued within the 45-day period, the appeal is considered to be disapproved and the decision of disapproval is considered to be issued on the 46th day. This provision allows the utility to continue with the appeal in a timely manner in the event that the director is unable or unwilling to act within the designated period.

New §21.42(f) provides the utility an opportunity to appeal a director's decision under §21.42(e). It must submit a written petition of appeal to the department's executive director within 30 days after issuance of the division director's decision. The executive director will issue, within 30 days after the date of receipt of the petition, a final written decision approving or disapproving the appeal. Revisions to new §21.42(f) are addressed in the COMMENTS section of this preamble.

New §21.42(g) provides the utility with an opportunity to appeal to a board of variance the executive director's decision under new §21.42(f). The utility must submit to the executive director its written petition of appeal to a board of variance, before the 31st day after the date that written notice of the adverse decision is received. The executive director will then appoint a board of variance composed of at least three persons who are not below the level of department division director, office director, or district engineer and each of whom was not involved in the original decision to deny the utility's request. A majority of the members of the board constitutes a quorum. The board of variance shall, before the 10th day preceding the date of the board meeting, give the utility notice of the time and place of the meeting and afford the utility an opportunity to attend and present evidence regarding the appeal. Before the 11th day after the date of the meeting, the board of variance will issue a final written decision approving or disapproving the appeal. Revisions to new §21.42(g) are addressed in the COMMENTS section of this preamble.

COMMENTS

Comments on the proposed new rules and amendments were received.

COMMENT:

The Executive Director of the Texas Pipeline Association, Patrick J. Nugent, submitted the following written comments to proposed new §21.24, amendments to §§21.31, 21.36, and 21.37, and new §21.42.

(1) New §21.24(b) and (c), State Participation in Gas Pipeline Relocations - The use of the words "owner or operator of the gas pipeline" instead of using the words "gas corporation" in several places in the subsections tends to mix the terms in a manner that causes unnecessary confusion. Mr. Nugent requests that the words "gas corporation" be consistently used throughout the two subsections.

(2) New §21.24(c)(2), State Participation in Gas Pipeline Relocations - The requirement in new §21.24(c)(2) that a "gas utility" file with the department a document issued by the Railroad Commission of Texas that it is a "gas utility" as defined by Utilities Code, §181.021 or a "common carrier" as defined by Natural Resources Code, Chapter 111 is not appropriate. The Railroad Commission of Texas does not issue such a document and does not use the definition of a "gas utility" in Utilities Code, §181.021 to determine gas utility status. Mr. Nugent suggests that §21.24(c)(2) simply provide that the document "substantiates that the pipeline has filed its status with the Railroad Commission and is a gas utility or common carrier."

(3) Amended §21.31(26), Definitions - The description of products being transported through a gathering line owned by a gas corporation as "utility product" is inappropriate because many such gathering lines are not utilities. Mr. Nugent suggests that this portion of the definition be left as it is presently written.

(4) Amended §21.31(40), Definitions - The inclusion of the phrase "directly or indirectly serves the public" in the definition of "public utility" introduces concepts that are not required by Utilities Code, §181.005 and creates the potential for controversy between the department and gas corporations on issues that HB 2572 was designed to resolve. Use of the word "producing" in the definition also adds unnecessary verbiage that could cause confusion by expanding the scope of the rule beyond the statutory grant in HB 2572. Mr. Nugent suggests that the phrase "directly or indirectly serves the public," the word "producing," and the words "for public consumption" be deleted. The phrase "which is authorized by state law to operate, construct, and maintain its facilities over, under, across, on, or along highways" should be sufficient for the definition. Mr. Nugent also requests that the term "gas corporation" be specifically included in the definition of "public utility" as a type of entity authorized to use state highway rights of way.

(5) Amended §21.36(a), Rights of Utilities - The provisions of §21.36(a) do not clearly include "gas corporations" in the description of entities that have the right to operate, construct, and maintain utility facilities over, under, across, on, or along highways. Mr. Nugent requests that the term "gas corporation" be specifically included in the subsection as a type of entity authorized to use highway rights of way.

(6) Amended §21.36(c), Rights of Utilities - The provisions of §21.36(c) should be revised to explicitly recognize that a "gas corporation" has the right to operate, construct, and maintain its facilities over, under, across, on, or along highways. The proposed §21.36(c)(2) should be deleted because any "gas corporation" is authorized under HB 2572 to lay lines longitudinally in highway rights of way. There is no need for any documentation regarding the entity being subject to public regulation.

(7) Amended §21.37, Design - The language of proposed §21.37(6) should be revised to delete the prohibition on the longitudinal placement of utility facilities in the outer separation of controlled access highways or freeways. There is no safety reason to maintain this prohibition, and in congested urban areas, such a prohibition may constitute an effective denial of the use of the highway right of way due to the lack of available space within the right of way outside of the frontage road.

(8) New §21.42, Appeal Process - The proposed rule specifically provides for an appeal of a decision made under §21.33 and §21.35, but does not specifically include an appeal from the design requirement decisions made under §21.37. The design requirements for installation of pipeline facilities is exactly the type of issue that HB 2572 intended to be included in a reasonable appeal process. Mr. Nugent requests that a decision made under §21.37 should be specified as a type of decision that can be appealed. In addition, the proposed appeal process stops with the executive director. Since the commissioner is the final authority at the department, the appeal process needs to provide for a decision by the commissioner if a facility owner is dissatisfied with the executive director's decision.

RESPONSE:

(1) The purpose of new §21.24(b) is to focus on a gas pipeline owned or operated by a gas corporation and identify those two statutory exceptions under which a gas corporation can be reimbursed for the cost of the pipeline's relocation. The "owner or operator of the pipeline" as referenced in §21.24(b)(1) clearly refers to the phrase "owned or operated by a gas corporation" in the introductory sentence of §21.24(b). Also, §21.24(a) provides that the entire section applies only to the adjustment of a gas pipeline that is owned or operated by a gas corporation. There should be no confusion.

The purpose of new §21.24(c) is to require any owner or operator of a gas pipeline to show that it is a gas utility or common carrier to justify its request for reimbursement. Whether or not it is also a gas corporation does not impact the decision.

No changes to §21.24(b) and (c) are made as a result of these comments.

(2) The requirement in new §21.24(c)(2) for documentation issued by the Railroad Commission of Texas that substantiates that the requesting pipeline owner or operator is a gas utility or common carrier is necessary to satisfy the department's due diligence obligation to verify the entity's legal status and eligibility for reimbursement under Utilities Code, §181.005. The specific type of documentation, however, may take different forms. In order to resolve Mr. Nugent's concern and add flexibility, new §21.24(c)(2) is revised to add language similar to his suggestion.

(3) With regard to the definition of "gathering line" in §21.31(26), Mr. Nugent correctly points out that there is no definition of a "utility product." A new definition is added as new §21.31(52). Although a gas gathering line may not be a "gas utility" as defined in the Utilities Code, §181.021, it is carrying a "utility product" as defined in new §21.31(52). The new definition is consistent with federal regulation 23 C.F.R. §645.105.

(4) The amended definition of "public utility" in §21.31(40) is intended to comply with Utilities Code, §181.005 by deleting existing language that requires the entity to be engaged in the business of transporting or distributing a utility product "for public consumption." Under Utilities Code, §181.005, that requirement no longer applies to gas corporations. The phrase "directly or indirectly serves the public" was intended to explain the undefined term "utility product" and link that term to the definition of "public utility." Since a definition of "utility product" is added as new §21.31(52), it is no longer necessary to provide that link.

To resolve Mr. Nugent's concern that the definition may create controversy as it applies to gas corporations, the definition of "public utility" in new §21.31(40) is revised to: delete the word "producing"; delete the phrase "directly or indirectly serves the public"; retain the primary description that a public utility is one "that is authorized by state law to operate, construct, and maintain its facilities over, under, across, on, or along highways,"; and specifically add the phrase "including a common carrier and gas corporation."

(5) The purpose of amended §21.36 is to identify those entities that have legal authority to place utility facilities longitudinally in the state highway rights of way. To incorporate Mr. Nugent's suggestion that gas corporations should be clearly included in this section, subsection §21.36(a) is revised to change the phrase "utilities authorized by law to transport or distribute" to the more inclusive phrase "entities authorized by law to transport or distribute." The revised definition of "public utility" in amended 43 TAC §21.31(40) should also assist in clarification of the gas corporation's authority under §21.36.

(6) The purpose of amended §21.36(c) is to authorize the department to require documentation necessary to satisfy it's due diligence obligation to verify the entity's legal status for placement of its utility facilities longitudinally in the state highway rights of way. This requirement is limited to only those situations in which the entity's legal authority is not readily evident and applies to all applicants - not just gas corporations. To clarify this general applicability, the word "utility" is replaced with the word "entity" in §21.36(c), and the word "lines" is replaced with the words "utility facilities" in §21.36(c)(1). Instead of deleting §21.36(c)(2) as requested by Mr. Nugent, paragraph (2) is revised to provide more flexibility in the type of documentation required. The revised paragraph requires documentation that substantiates that the entity filed its status with the applicable state regulatory commission or agency and that its facilities are subject to public safety regulation. The safety regulation requirement is consistent with the provisions of Utilities Code, §181.005.

(7) The proposed amendments to §21.37(b)(6) were for clarification purposes and only changed three references to the term "utility facilities." The prohibition on longitudinal placement of utility facilities in the outer separation of controlled access highways or freeways was already contained in §21.37 prior to the proposed amendment, and similar provisions have been part of the existing rule for many years. The origin of this requirement is based primarily on safety considerations. The area between the mainlanes of a highway for through traffic and a frontage road (the definition of "outer separation" in §21.31(37)) is normally within the clear zone of both the high speed mainlanes and the frontage road. Any installation or maintenance of a utility facility in this area would adversely impact the safety of the traveling public by periodically placing utility personnel, material, and equipment in the clear zone. It would also encourage the utilities to access their facilities from the mainlanes. In the event of a catastrophic occurrence such as a gas pipeline explosion, the close proximity of the utility facilities to the traveling public and highway facility significantly increases the danger to both. Longitudinal installation in the outer separation rather than along the outer edge of the highway right of way also creates greater difficulties for the department's operation and maintenance of the highway facility, particularly with regard to traffic control devices. Consideration of an adverse impact on highway and traffic safety caused by the placement of utility facilities along controlled access highways, and a preference for locating those utility facilities close to the outer edge of the highway right of way is mandated by 23 C.F.R. §645.209. No changes to §21.36(b)(6) are made as a result of the comments.

(8) New rule §21.42(a) provides for an appeal of specific decisions under 43 TAC §21.33 and §21.35 as well as a general denial of a utility's request for installation under §21.42(a)(3). An appeal of a design requirement under §21.37 may be submitted under either the general denial clause or the utility may request an exception to the design requirement under §21.35 and then appeal the adverse decision. To resolve Mr. Nugent's concern that a design requirement is not included and to clarify the procedure, new §21.42(a) is revised to specifically add the application of a design, construction, or maintenance requirement under §§21.37, 21.38, 21.40, and 21.41. The exception provision and general denial clause are also still available.

The second concern involving §21.42 relates to a utility's inability to appeal an adverse decision to the Texas Transportation Commission (commission) as the final authority for the department. A decision involving utility accommodation requirements normally requires a certain amount of engineering expertise which members of the commission generally do not possess. Rather than provide an additional appeal to the commission, new §21.42(g) is added to permit an appeal to a three person board of variance composed of senior department employees not below the level of division directors, office directors, or district engineers. The board of variance will provide a hearing and an opportunity for the utility to present evidence. The addition of a board of variance will make the utility accommodation appeal process similar to the appeal process for control of outdoor advertising in 43 TAC Chapter 21, Subchapter K. Since an additional appeal to a board of variance was added, the word "final" is deleted from the last sentence of §21.42(f).

SUBCHAPTER B. UTILITY ADJUSTMENT, RELOCATION, OR REMOVAL

43 TAC §21.24

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the commission to adopt rules to implement Transportation Code, Chapter 203, Subchapter E, concerning relocation of utility facilities required by improvements to the state highway system, and Utilities Code, §181.005, which directs the commission to adopt rules to provide an appeals process relating to the department's utility accommodation regulations.

CROSS REFERENCE TO STATUTE

Transportation Code, §§203.002, 203.003, 203.031, and 203.092; and Utilities Code, §181.005.

§21.24. State Participation in Gas Pipeline Relocations.

(a) This section applies only to the adjustment, modification, relocation, or removal of a gas pipeline that is owned or operated by a gas corporation authorized to act under Utilities Code, §181.005, and that is located longitudinally on a state highway right of way.

(b) The adjustment, modification, relocation, or removal of a gas pipeline owned or operated by a gas corporation made necessary by an improvement to a state highway will be at the sole cost and expense of the gas corporation, except that the department will reimburse the gas corporation for that cost and expense if:

(1) the owner or operator of the pipeline has a private property interest in the land occupied by the pipeline that is adjusted, modified, relocated, or removed; or

(2) the pipeline is owned or operated by a gas utility, as defined in the Utilities Code, §181.021 or a common carrier subject to Natural Resources Code, Chapter 111, and meets the requirements of Transportation Code, §203.092.

(c) If an owner or operator of a gas pipeline requests reimbursement from the department for the costs of adjustment, modification, relocation, or removal of its pipeline under subsection (b)(2) of this section, the pipeline owner or operator must provide:

(1) a written certification that it is a gas utility or common carrier that qualifies for reimbursement under subsection (b)(2) of this section; and

(2) documentation that substantiates that the pipeline owner or operator properly filed its status with the Railroad Commission of Texas and is a gas utility, as defined in the Utilities Code, §181.021 or a common carrier subject to Natural Resources Code, Chapter 111.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER C. UTILITY ACCOMMODATION

43 TAC §§21.31, 21.33, 21.34, 21.36, 21.37, 21.42

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the commission to adopt rules to implement Transportation Code, Chapter 203, Subchapter E, concerning relocation of utility facilities required by improvements to the state highway system, and Utilities Code, §181.005, which directs the commission to adopt rules to provide an appeals process relating to the department's utility accommodation regulations.

CROSS REFERENCE TO STATUTE

Transportation Code, §§203.002, 203.003, 203.031, and 203.092; and Utilities Code, §181.005.

§21.31. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AASHTO--American Association of State Highway and Transportation Officials.

(2) Abandoned utility--A utility facility that no longer carries a product or performs a function and for which the owner:

(A) does not plan to use in future operations; or

(B) is unknown or cannot be located.

(3) Access denial line--A line concurrent with the common property line across which access to the highway facility from the adjoining property is not permitted.

(4) As-Built plans--Drawings showing the actual locations of installed or relocated utility facilities.

(5) Border width--The area between the edge of pavement structure or back of curb to the right of way line.

(6) Bridge abutment joint--The joint between the approach slab and bridge structure.

(7) Center median--The area between opposite directions of travel on a divided highway.

(8) Certified as-installed construction plans--The construction plans for the installation of a utility facility, accompanied by an affidavit certifying that the facility was installed in accordance with the plans.

(9) Commission--The Texas Transportation Commission.

(10) Common carrier--As defined in the Natural Resources Code, §111.002.

(11) Conduit--A pipe or other opening, buried or above ground, for conveying fluids or gases, or serving as an envelope containing pipelines, cables, or other utility facilities.

(12) Controlled access highway--A highway so designated by the commission on which owners or occupants of abutting lands and other persons are denied access to or from the highway mainlanes.

(13) Department--The Texas Department of Transportation.

(14) Depth of cover--The minimum depth as measured from the top of the utility line to the ground line or top of pavement.

(15) Design vehicle load (HS-20)--A design load designation used for bridge design analysis representing a three-axle truck loaded with four tons on the front axle and 16 tons on each of the other two axles. The HS-20 designation is one of many established by AASHTO for use in the structural design and analysis of bridges.

(16) Director--The chief administrative officer in charge of either the Maintenance Division or the Right of Way Division, or a successor division of either the Maintenance Division or the Right of Way Division.

(17) Distribution line--That part of a utility system connecting a transmission line to a service line.

(18) District--One of the 25 geographical districts into which the department is divided.

(19) District engineer--The chief administrative officer in charge of a district, or his or her designee.

(20) Duct--A pipe or other opening, buried or above ground, containing multiple conduits.

(21) Engineer--A person licensed to practice engineering in the state of Texas.

(22) Engineering study--An appropriate level of analysis as determined by the department, which may include a traffic impact analysis, that determines the expected impact that permitting access will have on mobility, safety, and the efficient operation of the state highway system.

(23) Executive director--The chief administrative officer of the department, or that officer's designee not below the level of assistant executive director.

(24) Freeway--A divided highway with frontage roads or full control of access.

(25) Frontage road--A street or road auxiliary to, and located alongside, a controlled access highway or freeway that separates local traffic from high-speed through traffic and provides service to abutting property.

(26) Gathering line--A line that delivers a raw utility product from various sites to a central distribution or feed line for the purposes of refining, collecting, or storing the product.

(27) Hazardous material--Any gas, material, substance, or waste that, because of its quantity, concentration, or physical or chemical characteristics, is deemed by any federal, state, or local authority to pose a present or potential hazard to human health or safety or to the environment. The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (49 CFR §172.101), and materials that meet the defining criteria for hazard classes and divisions in 49 CFR Part 173 (49 CFR §171.8).

(28) High-pressure gas or liquid petroleum lines--Gas or liquid petroleum pipelines that are operated, or may reasonably be expected to operate in the future, at a pressure of over 60 pounds per square inch.

(29) Horizontal clearance--The areas of highway roadsides designed, constructed, and maintained to increase safety, improve traffic operation, and enhance the appearance of highways.

(30) Idled facility--A utility conduit or line which temporarily does not carry a product, or does not perform a function and whose owner has not provided a date for its return to operation.

(31) Inclement weather--Weather conditions that are hazardous to the safety of the traveling public, highway or utility workers, or the preservation of the highway.

(32) Joint use agreement--A use and occupancy agreement that describes the obligations, responsibilities, rights, and privileges vested in the department and retained by the utility, and used for situations in which the utility has a compensable interest in the land occupied by its facilities and the land is to be jointly occupied and used for highway and utility purposes.

(33) Low-pressure gas or liquid petroleum lines--Gas or liquid petroleum pipelines that are operated at a pressure not exceeding 60 pounds per square inch.

(34) Mainlanes--The traveled way of a freeway or controlled access highway that carries through traffic.

(35) Maintenance Division--The administrative office of the department responsible for the maintenance and operation of the state highway system.

(36) Noncontrolled access highway--A highway on which owners or occupants of abutting lands or other persons have direct access to or from the mainlanes by department permit.

(37) Outer separation--The area between the mainlanes of a highway for through traffic and a frontage road.

(38) Pavement structure--The combination of the surface, base course, and subbase.

(39) Private utility--A person, firm, corporation, or other entity engaged in a business other than a business described in paragraph (40) of this section, including an individual who owns a service line.

(40) Public utility--A person, firm, corporation, river authority, municipality, or other political subdivision that is engaged in the business of transporting or distributing a utility product and that is authorized by state law to operate, construct, and maintain its facilities over, under, across, on, or along highways. The term includes a common carrier and a gas corporation.

(41) Ramp terminus--The entrance or exit portion of a controlled access highway ramp adjacent to the through traveled lanes.

(42) Right of Way Division (ROW)--The administrative office of the department responsible for the acquisition and management of the state right of way.

(43) Riprap--An appurtenance placed on the exposed surfaces of soils to prevent erosion, including a cast-in-place layer of concrete or stones placed together.

(44) Service line--A utility facility that conveys electricity, gas, water, or telecommunication services from a main or conduit located in the right of way to a meter or other measuring device that services a customer or to the outside wall of a structure, whichever is applicable and nearer the right of way.

(45) TMUTCD--The most recent edition of Texas Manual on Uniform Traffic Control Devices for Streets and Highways.

(46) Traffic impact analysis--A traffic engineering study that determines the potential current and future traffic impacts of a proposed traffic generator and that is signed, sealed, and dated by an engineer licensed to practice in the state of Texas.

(47) Transmission line--That part of a utility system connecting a main energy or material source with a distribution system.

(48) Use and occupancy agreement--The written document, whether in the form of an agreement, acknowledgment, notice, or request, by which the department approves the use and occupancy of highway right of way by utility facilities.

(49) Utility--Any entity owning a public or private utility.

(50) Utility appurtenances--Any attachments or integral parts of a utility facility, including fire hydrants, valves, communication controller boxes and pedestals, electric boxes, and gas regulators.

(51) Utility facilities--All utility lines, pipelines, conduits, cables, and their appurtenances within the highway right of way except those for highway-oriented needs, including underground, surface, or overhead facilities either singularly or in combination, which may be transmission, distribution, service, or gathering lines.

(52) Utility product--A commodity, such as water, steam, electricity, gas, oil, or crude resources or communications, cable television, or waste disposal services, that directly or indirectly serves the public.

(53) Utility strip--The area of land established within a control of access highway, located longitudinally within the area between the outer traveled way and the right of way line, for the

nonexclusive use, occupancy, and access by one or more authorized public utilities.

(54) Utility structure--A pole, bridge, tower, or other aboveground structure on which a conduit, line, pipeline, or other utility facility is attached.

§21.36. Rights of Utilities.

(a) Under state law, public utilities have a right to operate, construct, and maintain their facilities over, under, across, on, or along highways, subject to highway purposes. This includes entities authorized by law to transport or distribute natural gas, water, electric power, telephone, cable television, or salt water and those that are authorized to construct and operate common carrier petroleum and petroleum product lines.

(b) A private utility may place a utility facility over, under, or across a highway, subject to highway purposes, but it is not permitted to place a utility facility longitudinally on a highway right of way.

(c) If an entity requests the installation of a new utility facility or the adjustment or relocation of an existing utility facility longitudinally within a highway right of way and the entity's legal authority to install, adjust, or relocate its facility longitudinally within the highway right of way is not readily evident, the department may require that the entity provide:

(1) a written certification that it is an entity authorized by state law to operate, construct, and maintain its utility facilities over, under, across, on, or along state highways; and

(2) documentation that substantiates that the entity filed its status with the applicable state regulatory commission or agency and its facilities are subject to public safety regulation.

§21.37. Design.

(a) General. The design of any utility installation, adjustment, or relocation is the responsibility of the utility. Utility design will be accomplished in a manner and to a standard acceptable to the department. The location and manner in which a utility installation, adjustment, or relocation work will be performed within the right of way must be reviewed and approved by the department. The department will review the measures to be taken to preserve the safety and free flow of traffic, structural integrity of the highway or highway structure, ease of highway maintenance, appearance of the highway, and the integrity of the utility facility. Utility installations shall conform with:

(1) the requirements of this subchapter;

(2) the National Electrical Safety Code rules for the installation and maintenance of electric supply and communication lines;

(3) 23 CFR Part 645B, Accommodation of Utilities;

(4) 49 CFR Part 192, Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards;

(5) 49 CFR Part 195, Transportation of Hazardous Liquids by Pipeline;

(6) the latest American Society for Testing and Materials (ASTM) specifications;

(7) the latest edition of the Texas Manual on Uniform Traffic Control Devices;

(8) 30 TAC §§290.38 - 290.47, relating to Rules and Regulations for Public Water Systems;

(9) applicable state and federal environmental regulations, including storm water pollution prevention, endangered species, and wetlands; and

(10) applicable Railroad Commission of Texas safety regulations.

(b) Location.

(1) Utility lines shall be located to avoid or minimize the need for adjustment for future highway projects and improvements, to allow other utilities equal access in the right of way, and to permit access to utility facilities for their maintenance with minimum interference to highway traffic.

(2) Longitudinal installations, if allowed, shall be located on uniform alignments to the right of way line to provide space for future highway construction and possible future utility installations.

(3) New utility lines crossing the highway shall be installed at approximately 90 degrees to the centerline of the highway.

(4) The horizontal and vertical location of overhead utility lines shall conform with §21.41 of this subchapter (relating to Overhead Electric and Communication Lines), consistent with the clearances applicable to all roadside obstacles. No aboveground fixed objects will be allowed in the horizontal clearance.

(5) The utility is responsible for determining whether other utility lines exist at, or if plans have been submitted to the department regarding, the proposed installation area. The utility must make every effort to insure that the proposed installation is compatible with existing and approved future utility facilities.

(6) A utility facility on controlled access highways or freeways shall be located to permit maintenance of the facility by access from frontage roads, nearby or adjacent roads and streets, or trails along or near the right of way line without access from the mainlanes or ramps. A utility facility may not be located longitudinally in the center median or outer separation of controlled access highways or freeways.

(7) On highways with frontage roads, longitudinal utility installations may be located between the frontage road and the right of way line. Utility facilities shall not be placed or allowed to remain in the center median, outer separation, or beneath any pavement, including shoulders.

(8) The procedures and requirements of this paragraph apply if a longitudinal installation is proposed within existing access denial lines of a controlled access highway or freeway without frontage roads.

(A) The public utility seeking the installation shall submit to the district engineer a written request that includes for each facility proposed for installation the following detailed information:

(i) the information required by §21.35 of this subchapter (relating to Exceptions);

(ii) survey data as directed by the department to identify and designate the location of a utility strip, the utility strip's relationship to existing highway facilities and the right of way line, and the specific area of use, occupancy, and access for installation and maintenance of the utility facility;

(iii) a plan for the utility's access to, from, and within the utility strip with clearly described procedures that preserve the safety and free flow of traffic on the controlled access highway or freeway during installation, maintenance, and emergency service or repair of the utility facility; and

(iv) any additional information, including an engineering study requested by the department, that is reasonably necessary for a determination of the impact of the proposed utility facility

on the safety, design, construction, operation, maintenance, and stability of the controlled access highway.

(B) If the requested utility facility installation meets the conditions of §21.35 of this subchapter and the other applicable requirements of this subchapter, the department shall establish a utility strip along the outer edge of the right of way by:

(i) locating a utility-access denial line between the proposed utility facility installation and the mainlanes and connecting ramps; and

(ii) designating the specific area of use, occupancy, and access for installation and maintenance of the requested utility facility.

(C) The department may adjust the utility-access denial line of an established utility strip to accommodate additional authorized utility facilities within the utility strip.

(D) The utility requesting installation of the utility facility is responsible for all costs associated with providing the information required for designation of a new or expanded utility strip. The utility shall delineate the utility-access denial line on the ground by setting readily identifiable, durable, and weatherproof permanent markers to represent or reference the corners, angle points, and points of curvature or tangency of the utility-access denial line.

(E) All existing and proposed fences shall be located at the freeway right of way line.

(F) Denial of access regarding property adjoining the right of way line will not be altered.

(c) Plans. Utilities shall be responsible and accountable for protecting the public investment in the highway, inclusive of all its components, and to maintain traffic capacity and safety for each highway user.

(1) All utility installations shall be of durable materials designed for long life expectancy and relatively free from the need for routine servicing or maintenance. In addition to the requirements of this subchapter, any existing utility lines to remain in place must be of satisfactory design and condition in the opinion of the district.

(2) Utilities shall avoid disturbing existing drainage courses. In addition, soil erosion shall be held to a minimum and sediment from the construction site shall be kept away from the highway and drain inlets.

(3) Utility expansions shall be planned to minimize hazards to, and interference with, future highway projects or other utility installations.

(4) Plans shall include the design, proposed location, vertical elevations, and horizontal alignments of the utility facility based on the department's survey data, the relationship to existing highway facilities and the right of way line, and location of existing utility facilities that may be affected by the proposed utility facility.

(5) As-built plans or certified as-installed construction plans shall include the installed location, vertical elevations, and horizontal alignments of the utility facility based upon the department's survey data, the relationship to existing highway facilities and the right of way line, and access procedures for maintenance of the utility facility. As-installed construction plans certified by a utility or its representative shall be submitted to the department for each relocation or new installation. In the alternative, if approved by the director of the Maintenance Division or Right of Way Division, a district may require a utility to deliver either as-installed construction plans that are certified by an independent party or final as-built plans that are signed and sealed by an engineer or registered professional land surveyor. In determining whether to authorize a requirement for independently certified or signed and sealed plans, the director shall consider:

(A) the amount of available right of way or the proposed utility facility's proximity to department facilities and other utility facilities that may be impacted; and

(B) past performance of the utility in providing accurate location data and conformance with its certified as-installed construction plans.

(6) If approved by the director of the Maintenance Division or the Right of Way Division, a district may require a utility to deliver plans that are signed and sealed by an engineer. In determining whether to authorize a requirement for signed and sealed plans, the director shall consider:

(A) the amount of available right of way or the proposed utility facility's proximity to department facilities or other utility facilities that may be impacted;

(B) the complexity of required traffic control plans;

(C) whether the installation or adjustment activity requires a storm water pollution prevention plan; and

(D) the utility's past performance in providing accurate location data and conformance with its construction plans.

(d) Tunnels and bridges.

(1) Interstate highways. In providing a utility tunnel or utility bridge, the requirements in subparagraphs (A) - (I) apply.

(A) Mutually hazardous transmittants, such as fuels and electric energy, shall be isolated by compartmentalizing or by auxiliary encasement of incompatible carriers.

(B) The utility tunnel or utility bridge structure shall conform in design, appearance, location, bury, earthwork, and markings to the culvert and bridge practices of the department.

(C) Where a pipeline on or in a utility structure is encased, the casing shall be effectively opened or vented at each end to prevent possible build up of pressure and to detect leakage of gases or fluids.

(D) Where a casing is not provided for a pipeline on or in a utility structure, additional protective measures shall be taken, such as employing a higher factor of safety in the design, construction, and testing of the pipeline than would be required for cased construction.

(E) Communication and electric power lines shall be insulated, grounded, and carried in protective conduit or pipe from the point of exit from the ground to reentry, and the cable carried to a manhole located beyond the backwall of the structure.

(F) Carrier and casing pipe for gas, liquid petroleum, hazardous product, and water lines shall be insulated from electric power line attachments.

(G) Sectionalized block valves shall be installed in lines at or near ends of utility structures, pursuant to 49 CFR §192.179, Transmission Line Valves, unless segments of the lines can be isolated by other sectionalizing devices within a distance acceptable to the department.

(H) Any maintenance, servicing, or repair of the utility lines will be the responsibility of the utility.

(I) The utility shall notify the district 48 hours in advance of any maintenance, servicing, or repair; however, in an emergency situation, the utility shall notify the district as soon as practicable.

(2) Non-interstate highways. If a utility's line exists on its own easement and it would be more economical to the department to adjust the line across a highway by use of a utility tunnel or bridge rather than to provide separately trenched and cased crossing, consideration should be given to provision of such a structure. Where the utility line was placed through an approved use and occupancy agreement and the adjustment of the utility is the sole responsibility of the utility owner, the department may allow for the provision of a utility structure without cost to the department, provided the conditions outlined in subsection (a) of this section and all other pertinent requirements are met. If a structure is to serve as a joint utility/pedestrian crossing or a joint utility/sign support structure, the department will participate to the extent necessary for accommodation of pedestrians or highway signs only.

(e) Joint use of utility and highway structures.

(1) The attachment of utility lines to bridges and grade separation structures is prohibited if other locations are feasible and reasonable.

(2) Where other arrangements for a utility line to span an obstruction are not feasible, the utility may submit a request to the district for attachment of the line to a bridge structure through a bridge attachment agreement. Each attachment will be considered on an individual basis, and permission to attach will not be considered as establishing a precedent for granting of subsequent requests for attachment.

(A) When it is impractical to carry a self-supporting communication line across a stream or other obstruction, the department may permit the attachment of the line to its bridge. If approved on existing bridges, the line must be enclosed in a conduit and so located on the structure as not to interfere with stream flow, traffic, or routine maintenance operations. When a request is made before construction of a bridge, if approved, suitable conduits may be provided in the structure if the utility bears the cost of all additional work and materials involved.

(B) If it is the department's responsibility to provide for the adjustment of telephone lines or telephone conduits to accommodate the construction of a highway and the adjustment provides for the placement of telephone conduits in a bridge, the department will allow a reasonable number of spare telephone conduits in the structure if the spares are placed at the time of construction and the telephone company bears the cost of the spare conduits.

(C) A utility shall not attach gas or liquid fuel lines to a bridge without the written approval of the executive director.

(D) Power lines carrying greater than 600 volts shall not be permitted on bridges.

(E) When a utility is granted permission to attach a pipeline to a proposed bridge prior to construction, any additional costs associated with the design or construction to accommodate the pipeline are the responsibility of the utility.

(F) A utility requesting permission to attach a pipeline to an existing bridge shall submit sufficient information to allow the department to conduct a stress analysis to determine the effect of the added load on the structure. The department may require other details of the proposed attachment as they affect safety and maintenance.

(f) Aesthetics. A utility will notify the department before removing, trimming, or replacing trees, bushes, shrubbery, or any other aesthetic features. The department must approve the extent and method of removal, trimming, or replacement of trees, bushes, shrubbery, or any other aesthetic feature.

§21.42. Appeal Process.

(a) A utility may file a petition of appeal to contest:

(1) a supplemental accommodation requirement prescribed under §21.33 of this subchapter (relating to Applicability);

(2) the application of a design, construction, or maintenance requirement under §21.37 (relating to Design), §21.38 (relating to Construction and Maintenance), §21.40 (relating to Underground Utilities), and §21.41 (relating to Overhead Electric and Communication Lines) of this subchapter;

(3) the denial of the utility's request for an exception under §21.35 of this subchapter (relating to Exceptions); or

(4) the denial of the utility's request under this subchapter for either the installation of a new utility facility or the adjustment or relocation of an existing utility facility.

(b) The petition must be filed with:

(1) the director of the Right of Way Division, if the utility facility that is the subject of the appeal occupies or is proposed to occupy the right of way under a utility joint use agreement; or

(2) the director of the Maintenance Division, if the utility facility that is the subject of the appeal occupies or is proposed to occupy the right of way under a use and occupancy agreement other than a utility joint use agreement.

(c) The petition must:

(1) be in writing;

(2) completely and succinctly state the grounds for appeal and its factual basis; and

(3) include sufficient factual documentation, such as drawings, surveys, or photographs, to establish the merits of the appeal.

(d) The utility has the burden of demonstrating that the department incorrectly applied its utility accommodation requirements to the applicable facts.

(e) The director of the division to which a petition that satisfies the requirements of this section is submitted will issue, within 45 days after the date of receipt of the petition, a written decision approving or disapproving the appeal and, on issuance, immediately send the decision to the utility. If a written decision is not issued within the 45-day period, the appeal is considered to be disapproved and the decision of disapproval is considered to be issued on the 46th day after the date of receipt of the petition.

(f) To appeal a decision issued under subsection (e) of this section, the utility must submit a written petition of appeal to the executive director within 30 days after the date that the division director's decision is issued. The petition must satisfy the requirements of subsection (c) of this section. The executive director will issue, within 30 days after the date of receipt of the petition, a written decision approving or disapproving the appeal.

(g) To appeal a decision of the executive director issued under subsection (f) of this section, the utility must submit to the executive director its written petition of appeal to a board of variance, before the 31st day after the date that the executive director's decision under subsection (f) of this section is received. On receipt of the petition, the procedure set out in this subsection applies.

(1) The executive director will appoint a board of variance composed of at least three persons, each of whom is not below the

level of department division director, office director, or district engineer and was not involved in a decision to deny the utility's request under subsections (a), (e), or (f) of this section. A majority of the members of the board constitutes a quorum.

(2) The board of variance will meet and consider the appeal. Before the 10th day preceding the date of the meeting, the board will give the utility notice of the time and place of the meeting and afford the utility an opportunity to attend and present evidence regarding the appeal.

(3) Before the 11th day after the date of the meeting, the board of variance will issue a final written decision approving or disapproving the appeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2009.

TRD-200905370
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 10, 2009
Proposal publication date: September 11, 2009
For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Board of Chiropractic Examiners

Title 22, Part 3

The Texas Board of Chiropractic Examiners (Board) files this notice of intention to review and to consider for readoption, amendment, or repeal Chapters 71 (Applications and Applicants), 73 (Licenses and Renewals), 74 (Chiropractic Facilities), 75 (Rules of Practice), 76 (Formal SOAH Proceedings), 77 (Advertising and Public Communication), 78 (Chiropractic Radiologic Technologists), 79 (Licensure of Certain Out-of-State Applicants), and 80 (Professional Conduct) of Title 22, Texas Administrative Code, Part 3. This review and consideration is being conducted in accordance with §2001.039 of the Texas Government Code.

The Board will assess whether the reason(s) for adopting or re-adopting these chapters continue to exist. Each section of the aforenamed chapters will be reviewed to determine whether it is obsolete, reflects current legal and policy considerations, reflects current general provisions in the governance of the Board, and/or whether it is in compliance with Chapter 2001 of the Texas Government Code (Administrative Procedure Act).

Comments on the rule review may be submitted in writing to H. A. ten Brink, General Counsel, Texas Board of Chiropractic Examiners, 333 Guadalupe Street, Tower III, Suite 825, Austin, Texas 78701. Comments may also be faxed to (512) 305-6705. The deadline for comments is 30 days after the publication of this rule review in the *Texas Register.* Any proposed changes to the sections of the aforenamed chapters as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption of any repeal, amendment, or re-adoption.

TRD-200905447
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Filed: November 23, 2009

♦ ♦ ♦

Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) proposes the review of 19 TAC Chapter 105, Foundation School Program, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the SBOE in 19 TAC Chapter 105 are organized under the following subchapters: Subchapter A, Definitions; and Subchapter B, Use of State Funds.

As required by the Texas Government Code, §2001.039, the SBOE will accept comments as to whether the reasons for adopting 19 TAC Chapter 105, Subchapters A and B, continue to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200905405
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: November 23, 2009

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 105, Foundation School Program, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 105 are organized under the following subchapters: Subchapter AA, Commissioner's Rules Concerning Optional Extended Year Program; Subchapter BB, Commissioner's Rules Concerning State Aid Entitlements; and Subchapter CC, Commissioner's Rules Concerning Severance Payments.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 105, Subchapters AA-CC, continue to exist.

The public comment period on the review of 19 TAC Chapter 105, Subchapters AA-CC, begins December 4, 2009, and ends January 4, 2010. Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200905404
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: November 23, 2009

♦ ♦ ♦

Texas Board of Veterinary Medical Examiners

Title 22, Part 24

The Texas Board of Veterinary Medical Examiners (Board) files this notice of intent to review Chapter 577, General Administrative Duties. This review is conducted in accordance with Government Code, §2001.039.

Chapter 577 contains the following rules:

§577.1. Officers.

§577.2. Meetings.

§577.3. Compensation.

§577.11. Appointments and Fund Disbursements.

§577.12. Directory of Licensees.

§577.15. Fee Schedule.

§577.16. Responsibilities of Board and Staff.

§577.17. Purchasing Protest Procedures.

§577.18. Historically Underutilized Businesses.

The Board has conducted a review of the rules in Chapter 577 and has preliminarily determined that the reasons for adopting the chapter continue to exist, with amendments to §577.2 and §577.12. These amendments are contemporaneously proposed elsewhere in this issue of the *Texas Register.*

The Board proposes to readopt the remainder of Chapter 577 without changes.

All comments or questions regarding this notice of intent to review may be submitted in writing to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7556, or by e-mail vet.board@tbvme.state.tx.us. Comments will be accepted for 30 days following publication in the *Texas Register.*

TRD-200905386

Loris Jones

Executive Assistant

Texas Board of Veterinary Medical Examiners

Filed: November 20, 2009

♦ ♦ ♦

Adopted Rule Review

State Board for Educator Certification

Title 19, Part 7

The State Board for Educator Certification (SBEC) adopts the review of Title 19, Texas Administrative Code (TAC), Chapter 229, Accountability System for Educator Preparation, pursuant to the Texas Government Code, §2001.039. The SBEC proposed the review of 19 TAC Chapter 229 in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1451).

Relating to the review of 19 TAC Chapter 229, the SBEC finds that the reasons for adoption continue to exist and proposes to readopt the rules with changes to update the rules as a result of Senate Bill 174, 81st Texas Legislature, 2009, which requires expanded accountability requirements for SBEC-approved educator preparation programs.

The SBEC is proposing the repeal of §§229.1 - 229.12 and new §§229.1 - 229.9, which may be found in the Proposed Rules section of this issue.

The SBEC received no comments related to the rule review of 19 TAC Chapter 229.

This concludes the review of 19 TAC Chapter 229.

TRD-200905455

Jerel Booker

Associate Commissioner, Educator Quality and Standards, Texas Education Agency

State Board for Educator Certification

Filed: November 23, 2009

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §55.119(a)

NOTICE OF LIEN

TO:
(Name/Address of recorder or asset holder)

Obligor:
(Name/Address/DOB/SSN)

FROM:
(IV-D Agency or name of obligee
and/or his or her private attorney or entity acting on behalf of the obligee,
address, phone, e-mail address, fax number)

Obligee:
(Name)

IV-D Case Number:

This lien results from a child support order, entered on _____ by _____ in_____ tribunal number _____.

As of _____, the obligor owes unpaid support in the amount of $ _____. This judgment may be subject to interest.

Prospective amounts of child support, not paid when due, are judgments that are added to the lien amount. This lien attaches to all non-exempt real and/or personal property of the above-named obligor which is located or existing within the State/county of filing, including any property specifically described below.

Specific description of property:

All aspects of this lien, including its priority and enforcement, are governed by the law of the State where the property is located. An obligor must follow the laws and procedures of the State where the property is located or recorded. An obligor may also contact the entity sending the lien. This lien remains in effect until released or withdrawn by the obligee or in accordance with the laws of the State where the property is located.
Note to Lien Recorder: Please provide the sender with a copy of the filed lien, containing the recording information, at the address provided above.

Check either "A" or "B" below. The option that does not apply may be omitted from the form. If "B" is checked, the form must be notarized.

A. [ ] Submitted by a IV-D agency/office on behalf of the named obligee
As an authorized agent of a State or Tribal, or subdivision of a State or Tribal, agency responsible for implementing the child support enforcement program set forth in Title IV, Part D, of the Federal Social Security Act (42 U.S.C. 651 et seq.), I have authority to file this child support lien in any State, or U.S. Territory. For additional information regarding this lien, including the pay-off amount, please contact the authorized agency and reference its case number, both listed above.

_____ _____
Date Authorized Agent

_____
Print name, e-mail address, phone and fax number

B. [ ] Submitted by an obligee or a private (non-IV-D) attorney or entity on behalf of an obligee

I am [ ] the obligee of the above referenced order [or]
[ ] an attorney or entity representing the above named obligee

I certify under penalty of perjury that the information contained in this notice is true and accurate and that this lien is submitted in accordance with the laws of the State of _____. For additional information regarding this lien, including the pay-off amount, please contact the obligee listed above.

_____ _____
Date Signature

_____
Print name, e-mail address, phone and fax number

Notary State:_____

County:_____

I certify that _____ appeared before me and is known to me as the individual who signed the above.

Date: _____

_____
Notary Public

My appointment expires _____

Notice: Respondents are not required to respond to this information collection unless it displays a valid OMB control number. The average burden for responding to this information collection is estimated at 30 minutes. If you believe this estimate is inaccurate, or if you have ideas to reduce this burden, please provide comment to the issuing agency.
OMB Control #: 0970-0153 Expiration Date: 02/28/2011

Figure: 1 TAC §55.120(a)

NATIONAL MEDICAL SUPPORT NOTICE
PART A
NOTICE TO WITHHOLD FOR HEALTH CARE COVERAGE

This Notice is issued under section 466(a)(19) of the Social Security Act, section 609(a)(5)(C) of the Employee Retirement Income Security Act of 1974 (ERISA), and for State and local government and church plans, sections 401(e) and (f) of the Child Support Performance and Incentive Act of 1998. Receipt of this Notice from the Issuing Agency constitutes receipt of a Medical Child Support Order under applicable law. The information on the Custodial Parent and Child(ren) contained on this page is confidential and should not be shared or disclosed with the Noncustodial Parent.

Issuing Agency: _____ Issuing Agency Address: _____ _____ Date of Notice: _____ Case Number: _____ Telephone Number: _____ FAX Number: _____ Employer web site: _____	Court or Administrative Authority: _____ Date of Support Order: _____ Support Order Number: _____

_____
Employer/Withholder's Federal EIN Number

_____
Employer/Withholder's Name

_____
Employer/Withholder's Address

_____
Custodial Parent's Name (Last, First, MI)

_____
Custodial Parent's Mailing Address

_____
Child(ren)'s Mailing Address (if different from Custodial Parent's)

_____
_____
_____
Name, Mailing Address, and Telephone Number of a Representative of the Child(ren)

RE: _____
Employee's Name (Last, First, MI)

_____
Employee's Social Security Number

_____
Employee's Mailing Address

_____
Substituted Official/Agency Name and Address
(Required if Custodial Parent's mailing address is left blank)

Child(ren)'s Name(s)	DOB	SSN	Child(ren)'s Name(s)	DOB	SSN
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

The order requires the child(ren) to be enrolled in [ ] any health coverages available; or [ ] only the following coverage(s): __Medical; __Dental; __Vision; __Prescription drug; __Mental health; __Other (specify):_____

THE PAPERWORK REDUCTION ACT OF 1995 (P.L. 104-13) Public reporting burden for this collection of information is estimated to average 10 minutes per response, including the time reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB control number: 0970-0222 Expiration Date: 03/31/2011.

EMPLOYER RESPONSE

If 1, 2, 3 or 4 below applies, check the appropriate box and return this Part A to the Issuing Agency within 20 business days after the date of the Notice, or sooner if reasonable. NO OTHER ACTION IS NECESSARY. If 1, 2, 3 or 4 do not apply, forward **Part B** to the appropriate plan administrator(s) within 20 business days after the date of the Notice, or sooner if reasonable. This includes any organization or labor union that provides group health care benefits to the employee. Check number 5 and return this **Part A** to the **Issuing Agency** if the Plan Administrator informs you that the child(ren) would be enrolled in or qualify(ies) for an option under the plan for which you have determined that the employee contribution exceeds the amount that may be withheld from the employee's income due to State or Federal withholding limitations and/or prioritization. You are required to respond to the Issuing Agency by returning this **Employer Response** regardless of whether you provide group health benefits or the employee named herein is no longer employed by your organization. Information on the Employer Representative at the bottom of this section is required.

☐ 1. The employee named in this Notice has never been employed by this employer.

☐ 2. We, the employer, do not maintain or contribute to plans providing dependent or family health care coverage to our employees.

☐ 3. The employee is among a class of employees (for example, part-time or non-union) that are not eligible for family health coverage under any group health plan maintained by the employer or to which the employer contributes. Do not check this box if the employee is only temporarily ineligible for health care coverage.

☐ 4. Health care coverage is not available because employee is no longer employed by the employer:

Date of termination: _____

Last known telephone number: _____

Last known address: _____

New employer (if known): _____

New employer telephone number: _____

New employer address: _____

☐ 5. State or Federal withholding limitations and/or prioritization prevent the withholding from the employee's income of the amount required to obtain coverage under the terms of the plan.

Employer Representative (Required):

Name: _____ Telephone Number: _____

Title: _____ Date: _____

Federal EIN (if not provided by Issuing Agency on Page 1 of this Notice to Withhold for Health Care Coverage): _____

INSTRUCTIONS TO EMPLOYER

This document serves as legal notice that the employee identified on this National Medical Support Notice is obligated by a court or administrative child support order to provide health care coverage for the child(ren) identified on this Notice. This National Medical Support Notice replaces any Medical Support Notice that the Issuing Agency has previously served on you with respect to the employee and the children listed on this Notice.

The document consists of **Part A - Notice to Withhold for Health Care Coverage** for the employer to withhold any employee contributions required by the group health plan(s) in which the child(ren) is/are enrolled; and **Part B - Medical Support Notice to the Plan Administrator**, which **must** be forwarded to the administrator of each group health plan identified by the employer to enroll the eligible child(ren), or completed by the employer, if the employer serves as the health plan administrator.

An employer receiving this legal Notice is required to complete and return **Part A** if appropriate. If group health coverage is not available to the employee named herein, or the employee was never or is no longer employed, the employer is still required to complete **Part A – Employer Response** and return it to the Issuing Agency with the appropriate response checked. If you, the employer, provide the health care benefits to the employee, forward **Part B – Plan Administrator Response** to the health plan administrator of your organization. If the employee's health care benefits are administered through another organization, including a labor union, forward Part B of the Notice to the labor union or other organization acting as the plan administrator for completion. If the employee has already enrolled the child(ren) in health care coverage, the employer must forward Part B to the plan administrator for completion and submittal to the Issuing Agency.

Keep a copy of **Part A** as it may be used to notify the Issuing Agency at anytime in the future the employee separates from service for any reason including retirement or termination.

EMPLOYER RESPONSIBILITIES

1. If the individual named in this Notice is not your employee, or if family health care coverage is not available, please complete item 1, 2, 3 or 4 of the Employer Response as appropriate, and return it to the Issuing Agency. NO FURTHER ACTION IS NECESSARY.

2. If family health care coverage is available for which the child(ren) identified above may be eligible, you are required to:

    a. Transfer, not later than 20 business days after the date of this Notice, a copy of **Part B - Medical Support Notice to the Plan Administrator** to the administrator of each appropriate group health plan for which the child(ren) may be eligible, and

    b. Upon notification from the plan administrator(s) that the child(ren) is/are enrolled, either

        1) withhold from the employee's income any employee contributions required under each group health plan, in accordance with the applicable law of the employee's principal place of employment and transfer employee contributions to the appropriate plan(s), or

        2) complete item 5 of the Employer Response to notify the Issuing Agency-that enrollment cannot be completed because of prioritization or limitations on withholding.

c. If the plan administrator notifies you that the employee is subject to a waiting period that expires more than 90 days from the date of its receipt of **Part B** of this Notice, or whose duration is determined by a measure other than the passage of time (for example, the completion of a certain number of hours worked), notify the issuing agency of the enrollment timeframe and notify the plan administrator when the employee is eligible to enroll in the plan and that this Notice requires the enrollment of the child(ren) named in the Notice in the plan.

LIMITATIONS ON WITHHOLDING

The total amount withheld for both cash and medical support cannot exceed ___% of the employee's aggregate disposable weekly earnings. The employer may not withhold more under this National Medical Support Notice than the lesser of:

1. The amounts allowed by the Federal Consumer Credit Protection Act (15 U.S.C., section 1673(b));

2. The amounts allowed by the State of the employee's principal place of employment; or

3. The amounts allowed for health insurance premiums by the child support order, as indicated here:_____.

The Federal limit applies to the aggregate disposable weekly earnings (ADWE). ADWE is the net income left after making mandatory deductions such as State, Federal, local taxes; Social Security taxes; and Medicare taxes. As required under section 2.b.2 of the Employer Responsibilities on prior page, complete item 5 of the Employer Response to notify the Issuing Agency that enrollment cannot be completed because of prioritization or limitations on withholding.

PRIORITY OF WITHHOLDING

If withholding is required for employee contributions to one or more plans under this notice and for a support obligation under a separate notice and available funds are insufficient for withholding for both cash and medical support contributions, the employer must withhold amounts for purposes of cash support and medical support contributions in accordance with the law, if any, of the State of the employee's principal place of employment requiring prioritization between cash and medical support, as described here:_____
_____. As required under section 2.b.2 of the Employer Responsibilities on prior page, complete item 5 of the Employer Response to notify the Issuing Agency that enrollment cannot be completed because of prioritization or limitations on withholdings.

DURATION OF WITHHOLDING

The child(ren) shall be treated as dependents under the terms of the plan. Coverage of a child as a dependent will end when conditions for eligibility for coverage under terms of the plan no longer apply. However, the continuation coverage provisions of ERISA may entitle the child to continuation coverage under the plan. The employer must continue to withhold employee contributions and may not disenroll (or eliminate coverage for) the child(ren) unless:

1. The employer is provided satisfactory written evidence that:

a. The court or administrative child support order referred to in this Notice is no longer in effect; or
b. The child(ren) is or will be enrolled in comparable coverage which will take effect no later than the effective date of disenrollment from the plan; or

2. The employer eliminates family health coverage for all of its employees.

POSSIBLE SANCTIONS

An employer may be subject to sanctions or penalties imposed under State law and/or ERISA for discharging an employee from employment, refusing to employ, or taking disciplinary action against any employee because of medical child support withholding, or for failing to withhold income, or transmit such withheld amounts to the applicable plan(s) as the Notice directs. Sanctions or penalties may be imposed under State law against an employer for failure to respond and/or for non-compliance with this Notice.

NOTICE OF TERMINATION OF EMPLOYMENT

In any case in which the above employee's employment terminates, the employer must promptly notify the Issuing Agency listed above of such termination. This requirement may be satisfied by sending to the Issuing Agency a copy of Part A with response 4 checked or any notice the employer is required to provide under the continuation coverage provisions of ERISA or the Health Insurance Portability and Accountability Act.

EMPLOYEE LIABILITY FOR CONTRIBUTION TO PLAN

The employee is liable for any employee contributions that are required under the plan(s) for enrollment of the child(ren) and is subject to appropriate enforcement. The employee may contest the withholding under this Notice based on a mistake of fact (such as the identity of the obligor). Should an employee contest the withholding under this Notice, the employer must proceed to comply with the employer responsibilities in this Notice until notified by the Issuing Agency to discontinue withholding. To contest the withholding under this Notice, the employee should contact the Issuing Agency at the address and telephone number listed on the Notice. With respect to plans subject to ERISA, it is the view of the Department of Labor that Federal Courts have jurisdiction if the employee challenges a determination that the Notice constitutes a Qualified Medical Child Support Order.

CONTACT FOR QUESTIONS

If you have any questions regarding this Notice, you may contact the Issuing Agency at the address and telephone number listed at page 1 of this Notice.

Indicate below to the Issuing Agency the requested information on your Plan Administrator to whom Part B – Plan Administrator Response is forwarded for completion.

Plan Administrator (Required):

Name: _____ Telephone Number: _____

Contact Person: _____ FAX Number: _____

NATIONAL MEDICAL SUPPORT NOTICE OMB NO. 1210-0113

PART B
MEDICAL SUPPORT NOTICE TO PLAN ADMINISTRATOR

This Notice is issued under section 466(a)(19) of the Social Security Act, section 609(a)(5)(C) of the Employee Retirement Income Security Act of 1974, and for State and local government and church plans, sections 401(e) and (f) of the Child Support Performance and Incentive Act of 1998. Receipt of this Notice from the Issuing Agency constitutes receipt of a Medical Child Support Order under applicable law. The rights of the parties and the duties of the plan administrator under this Notice are in addition to the existing rights and duties established under such law.

Issuing Agency: _____ Issuing Agency Address: _____ _____ Date of Notice: _____ Case Number: _____ Telephone Number: _____ FAX Number: _____	Court or Administrative Authority: _____ Date of Support Order: _____ Support Order Number: _____

_____)
Employer/Withholder's Federal EIN Number

_____)
Employer/Withholder's Name

_____)
Employer/Withholder's Address

_____)
Custodial Parent's Name (Last, First, MI)

_____)
Custodial Parent's Mailing Address

_____)
Child(ren)'s Mailing Address (if Different from Custodial Parent's)

_____)
_____)
_____)
Name(s), Mailing Address, and Telephone Number of a Representative of the Child(ren)

RE* _____
Employee's Name (Last, First, MI)

_____
Employee's Social Security Number

_____
Employee's Address

_____
Substituted Official/Agency Name and Address

Child(ren)'s Name(s)	DOB	SSN	Child(ren)'s Name(s)	DOB	SSN
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

The order requires the child(ren) to be enrolled in [] any health coverages available; or [] only the following coverage(s): __medical; __dental; __vision; __prescription drug; __mental health; __other (specify):_____

PLAN ADMINISTRATOR RESPONSE

(To be completed and returned to the Issuing Agency within 40 business days after the date of the Notice, or sooner if reasonable)

This Notice was received by the plan administrator on_____.

☐ 1. This Notice was determined to be a "qualified medical child support order," on _____. Complete **Response 2 or 3, and 4**, if applicable.

2. The participant (employee) and alternate recipient(s) (child(ren)) are to be enrolled in the following family coverage.

☐ a. The child(ren) is/are currently enrolled in the plan as a dependent of the participant.

☐ b. There is only one type of coverage provided under the plan. The child(ren) is/are included as dependents of the participant under the plan.

☐ c. The participant is enrolled in an option that is providing dependent coverage and the child(ren) will be enrolled in the same option.

☐ d. The participant is enrolled in an option that permits dependent coverage that has not been elected; dependent coverage will be provided.

Coverage is effective as of __/__/____(includes waiting period of less than 90 days from date of receipt of this Notice). The child(ren) has/have been enrolled in the following option: _____. Any necessary withholding should commence if the employer determines that it is permitted under State and Federal withholding and/or prioritization limitations.

☐ 3. There is more than one option available under the plan and the participant is not enrolled. The Issuing Agency must select from the available options. Each child is to be included as a dependent under one of the available options that provide family coverage. If the Issuing Agency does not reply within 20 business days of the date this Response is returned, the child(ren), and the participant if necessary, will be enrolled in the plan's default option, if any: _____.

☐ 4. The participant is subject to a waiting period that expires __/__/____ (more than 90 days from the date of receipt of this Notice), or has not completed a waiting period which is determined by some measure other than the passage of time, such as the completion of a certain number of hours worked (describe here: _____). At the completion of the waiting period, the plan administrator will process the enrollment.

☐ 5. This Notice does not constitute a "qualified medical child support order" because:

☐ The name of the ☐ child(ren) or ☐ participant is unavailable.

☐ The mailing address of the ☐ child(ren) (or a substituted official) or ☐ participant is unavailable.

☐ The following child(ren) is/are at or above the age at which dependents are no longer eligible for coverage under the plan _____ (insert name(s) of child(ren)).

Plan Administrator or Representative:

Name: _____ Telephone Number: _____

Title: _____ Date: _____

Address: _____

INSTRUCTIONS TO PLAN ADMINISTRATOR

This Notice has been forwarded from the employer identified above to you as the plan administrator of a group health plan maintained by the employer (or a group health plan to which the employer contributes) and in which the noncustodial parent/participant identified above is enrolled or is eligible for enrollment.

This Notice serves to inform you that the noncustodial parent/participant is obligated by an order issued by the court or agency identified above to provide health care coverage for the child(ren) under the group health plan(s) as described on **Part B**.

(A) If the participant and child(ren) and their mailing addresses (or that of a Substituted Official or Agency) are identified above, and if coverage for the child(ren) is or will become available, this Notice constitutes a "qualified medical child support order" (QMCSO) under ERISA or CSPIA, as applicable. (If any mailing address is not present, but it is reasonably accessible, this Notice will not fail to be a QMCSO on that basis.) You must, within 40 business days of the date of this Notice, or sooner if reasonable:

(1) Complete Part B - Plan Administrator Response - and send it to the Issuing Agency:

(a) if you checked Response 2:

(i) notify the noncustodial parent/participant named above, each named child, and the custodial parent that coverage of the child(ren) is or will become available (notification of the custodial parent will be deemed notification of the child(ren) if they reside at the same address);

(ii) furnish the custodial parent a description of the coverage available and the effective date of the coverage, including, if not already provided, a summary plan description and any forms, documents, or information necessary to effectuate such coverage, as well as information necessary to submit claims for benefits;

(b) if you checked Response 3:

(i) if you have not already done so, provide to the Issuing Agency copies of applicable summary plan descriptions or other documents that describe available coverage including the additional participant contribution necessary to obtain coverage for the child(ren) under each option and whether there is a limited service area for any option;

(ii) if the plan has a default option, you are to enroll the child(ren) in the default option if you have not received an election from the Issuing Agency within 20 business days of the date you returned the Response. If the plan does not have a default option, you are to enroll the child(ren) in the option selected by the Issuing Agency.

(c) if the participant is subject to a waiting period that expires more than 90 days from the date of receipt of this Notice, or has not completed a waiting period whose duration is determined by a measure other than the passage of time (for example, the completion of a certain number of hours worked), complete Response 4 on the Plan Administrator Response and return to the employer and the Issuing Agency, and notify the participant and the custodial parent; and upon satisfaction of the period or requirement, complete enrollment under Response 2 or 3, and

(d) upon completion of the enrollment, transfer the applicable information on Part B - Plan Administrator Response to the employer for a determination that the necessary employee contributions are available. Inform the employer that the enrollment is pursuant to a National Medical Support Notice.

(B) If within 40 business days of the date of this Notice, or sooner if reasonable, you determine that this Notice does not constitute a QMCSO, you must complete Response 5 of Part B - Plan Administrator Response and send it to the Issuing Agency, and inform the noncustodial parent/participant, custodial parent, and child(ren) of the specific reasons for your determination.

(C) Any required notification of the custodial parent, child(ren) and/or participant that is required may be satisfied by sending the party a copy of the Plan Administrator Response, if appropriate.

UNLAWFUL REFUSAL TO ENROLL

Enrollment of a child may not be denied on the ground that: (1) the child was born out of wedlock; (2) the child is not claimed as a dependent on the participant's Federal income tax return; (3) the child does not reside with the participant or in the plan's service area; or (4) because the child is receiving benefits or is eligible to receive benefits under the State Medicaid plan. If the plan requires that the participant be enrolled in order for the child(ren) to be enrolled, and the participant is not currently enrolled, you must enroll both the participant and the child(ren). All enrollments are to be made without regard to open season restrictions.

PAYMENT OF CLAIMS

A child covered by a QMCSO, or the child's custodial parent, legal guardian, or the provider of services to the child, or a State agency to the extent assigned the child's rights, may file claims and the plan shall make payment for covered benefits or reimbursement directly to such party.

PERIOD OF COVERAGE

The alternate recipient(s) shall be treated as dependents under the terms of the plan. Coverage of an alternate recipient as a dependent will end when similarly situated dependents are no longer eligible for coverage under the terms of the plan. However, the continuation coverage provisions of ERISA or other applicable law may entitle the alternate recipient to continue coverage under the plan. Once a child is enrolled in the plan as directed above, the alternate recipient may not be disenrolled unless:

(1) The plan administrator is provided satisfactory written evidence that either:

(a) the court or administrative child support order referred to above is no longer in effect, or

(b) the alternate recipient is or will be enrolled in comparable coverage which will take effect no later than the effective date of disenrollment from the plan;

(2) The employer eliminates family health coverage for all of its employees; or

(3) Any available continuation coverage is not elected, or the period of such coverage expires.

CONTACT FOR QUESTIONS

If you have any questions regarding this Notice, you may contact the Issuing Agency at the address and telephone number listed above.

Paperwork Reduction Act Notice

The Issuing Agency asks for the information on this form to carry out the law as specified in the Employee Retirement Income Security Act or the Child Support Performance and Incentive Act, as applicable. You are required to give the Issuing Agency the information. You are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Issuing Agency needs the information to determine whether health care coverage is provided in accordance with the underlying child support order. The Average time needed to complete and file the form is estimated below. These times will vary depending on the individual circumstances.

	Learning about the law or the form	**Preparing the form**
First Notice	1 hr.	1 hr., 45 min.
Subsequent Notices	-----	35 min.

Figure: 1 TAC §81.116(a)

The formula for estimating turnout for the 2010 primary elections is:

$$A \times B + C = D$$

Where: A = the percentage of voter turnout for governor or another statewide race in the 2006 party primary (percentage is the sum of all votes cast for all candidates for governor or other statewide office in the 2006 primary divided by the number of registered voters).

B = the number of registered voters as of October 2009.

C = 25% of the number resulting when you multiply A x B.

D = Preliminary Estimated 2010 Turnout.

Figure: 16 TAC §401.317(d)(3)

Number of Matches Per Play	**Prize Payment**	**Prize Pool Percentage Allocated to Prize**
All five (5) of first set plus one (1) of second set.	Grand Prize	65.0577%*
All five (5) of first set and none of second set.	$200,000	7.7849%
Any four (4) of first set plus one (1) of second set.	$10,000	2.7657%
Any four (4) of first set and none of second set.	$100	1.0510%
Any three (3) of first set plus one (1) of second set.	$100	1.4658%
Any three (3) of first set and none of second set.	$7	3.8991%
Any two (2) of first set plus one (1) of second set.	$7	1.7785%
Any one (1) of first set plus one (1) of second set.	$4	6.4789%
None of first set plus one (1) of second set.	$3	9.7184%

** When the Grand Prize reaches a new high level, the Prize Pool Percentage allocated to the Grand Prize shall be reduced to that percentage needed to fund the maximum Grand Prize increase as determined by the Powerball Group, with the remainder funding the Match 5 Bonus Prize category.*

Figure: 16 TAC §401.317(e)

Number of Matches Per Ticket	Probability Distribution		Probable/Set Prize Amount
	Winners	Probability	
All five (5) of first set plus one (1) of second set	1	1:195,249,054.0000	Grand Prize
All five (5) of first set and none of second set	38	1:5,138,133.0000	$200,000
Any four (4) of first set plus one (1) of second set	270	1:723,144.6444	$10,000
Any four (4) of first set and none of second set	10,260	1:19,030.1222	$100
Any three (3) of first set plus one (1) of second set	14,310	1:13,644.2386	$100
Any three (3) of first set and none of second set	543,780	1:359.0589	$7
Any two (2) of the first set plus one (1) of second set	248,040	1:787.1676	$7
Any one (1) of the first set plus one (1) of the second set	1,581,255	1:123.4773	$4
None of the first set plus one (1) of second set	3,162,510	1:61.7386	$3
Overall	5,560,464	1:35.1138	

Figure: 16 TAC §401.317(k)(5)(C)

	Prize Amount	5X	5X	5X	5X
Match 5+0	$200,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
	Prize Amount	5X	4X	3X	2X
Match 4+1	$10,000	$50,000	$40,000	$30,000	$20,000
Match 4+0	$100	$500	$400	$300	$200
Match 3+1	$100	$500	$400	$300	$200
Match 3+0	$7	$35	$28	$21	$14
Match 2+1	$7	$35	$28	$21	$14
Match 1+1	$4	$20	$16	$12	$8
Match 0+1	$3	$15	$12	$9	$6

Figure: 16 TAC §401.317(k)(6)

Power Play Probability of Prize Increase

5X - Prize Won Times 5	1 in 4
4X - Prize Won Times 4	1 in 4
3X - Prize Won Times 3	1 in 4
2X - Prize Won Times 2	1 in 4

Power Play does not apply to the Powerball Grand Prize or to any Match 5 Bonus Prize.

Figure: 16 TAC §402.420

Religious Society:

Qualifications and Requirements	Necessary Documentation
Must be organized primarily for religious purposes.	A signed and dated copy of the most recent version of all of the organization's organizing instrument(s); Or A copy of the page from the applicant's parent organization religious directory that lists the applicant organization's information. The name of the applicant organization must match the name of the organization on the documents submitted.
Must have been organized in Texas for at least three years.	If the applicant is affiliated with a state or national organization, Schedule G - Verification by Parent Organization. If the applicant is not affiliated with a state or national organization, a copy of a listing in a publication such as a national roster or newspaper article naming the organization; Or A letter to the applicant from a government agency. The document submitted must reflect the applicant's name, Texas address, and either be dated three years prior to the application date or establish the date the organization was founded.
Must demonstrate that the organization has made significant progress toward the accomplishment of its purposes during the 12 months preceding the date of application.	At least three (3) different types of acceptable documents as proof that your organization was continuously engaged in furthering your charitable purpose for the time period beginning one year prior to the date the application was signed. Examples of acceptable documentation include: 1. a letter from the diocese, 2. notices of church services, and/or church bulletins, 3. canceled checks for clergy salaries, religious books, materials and/or supplies, maintenance of religious building(s), and 4. records of marriages performed, or records of funerals performed. To establish the beginning date, an organization may submit documentation dated up to three months prior to the year before the application was signed in order to

	prove that the organization has been continuously engaged in furthering its charitable purpose throughout the past twelve months. All documents must be dated and indicate the name of the organization.
Must appoint only the organization's members to serve as operators for the organization.	A current membership list with all officers and directors noted. Officers would include a priest, pastor, rabbi, or other head of the church. Membership list will be compared to persons listed on the application to confirm that only members have been named as operators.
Must ensure that all of the organization's officers, directors and operators have not been convicted of a felony, criminal fraud, a gambling or gambling-related offense, or a crime of moral turpitude if less than 10 years has elapsed since the termination of a sentence, parole, mandatory supervision, or community supervision served for the offense.	A signed and dated copy of the most recent version of all of the organization's organizing instruments(s) that list the officer and director positions; Or If officers and/or directors are not listed in organizing instruments, a current membership list identifying officers and directors. If officer and/or director positions are unfilled, a statement signed by an officer indicating which positions are vacant. The Commission will compare the number of officers and directors included in the documents to the application to ensure all officers and directors have been disclosed. The Department of Public Safety will conduct a criminal history check on all officers, directors, and operators. Any officer, director, or operator not meeting the criminal history background requirement must resign before a license may be issued.
Section 2001.102 License Application Requirements.	Most recent copy of IRS Form 990 if organization is required to file it with the Internal Revenue Service. Indicate on application if organization is not required to file Form 990; And If the organization is organized under the law of this state, the organization must be in good standing with the Secretary of State (SOS). The Commission will request additional documentation from the applicant if unable to validate good standing directly with the SOS.

Non-Profit Medical Organization:

Qualifications and Requirements	Necessary Documentation
Main activities must be in support of medical research or treatment programs.	A signed and dated copy of the most recent version of all of the organization's organizing instruments. The name of the applicant organization must match the name of the organization on the organizing instruments.
Must have had a governing body or officers elected by the vote of the members or delegates elected by the members for at least three years.	Copies of meeting minutes recording officer elections for the past three years showing the date of each meeting and signature of an officer; Or A dated list of officers and positions held for each year of the past three years. A statement signed by an officer indicating which positions were left open if the organization had positions defined in organizing instrument(s) that the organization did not fill. Organizing instrument(s) will be reviewed to ensure that the organization has members who elect officers and to confirm the officer positions.
Must have been affiliated with a state or national organization organized to perform the same purposes for at least three years.	Schedule G - Verification by Parent Organization
Must hold a valid 501(c) exemption through the Internal Revenue Service.	If the Commission is unable to validate directly with the Internal Revenue Service that the organization has a 501(c) designation, the Commission will request additional documentation from the applicant.
May not distribute any income to members, officers, or governing body except as reasonable compensation for services.	Most recent copy of IRS Form 990 if organization is required to file it with the Internal Revenue Service. Indicate on application if organization is not required to file Form 990. A signed and dated copy of the most recent version of all of the organization's organizing instruments.
Must demonstrate significant progress toward the accomplishment of the organization's purposes during the 12 months preceding the date of application.	At least three (3) different types of acceptable documents as proof that organization was engaged in furthering its charitable purpose for the time period beginning one year prior to the date the application was signed. Acceptable documentation may include: 1. canceled checks in support of medical treatment or research programs, i.e., American Cancer Society, Muscular Dystrophy Association, or other recognized organizations dedicated to the elimination of disease;

	2. canceled checks for the purchase of medical equipment or to provide medical care for the needy; 3. letters of appreciation from individuals or organizations receiving benefits for treatment; 4. IRS Form 990; and 5. newspaper articles. To establish the beginning date, an organization may submit documentation dated up to three months prior to the year before the application was signed in order to prove that the organization has been engaged in furthering its charitable purposes throughout the past twelve months. All documents must be dated and indicate the name of the organization.
May appoint only the organization's members to serve as operators.	A current membership list with officers and directors noted. Membership list will be compared to the persons listed on the application to confirm that only members have been named as operators.
Must ensure that all officers, directors and operators have not been convicted of a felony, criminal fraud, a gambling or gambling-related offense, or a crime of moral turpitude if less than 10 years has elapsed since the termination of a sentence, parole, mandatory supervision, or community supervision served for the offense.	A signed and dated copy of the most recent version of all of the organization's organizing instruments that list the officer and director positions; Or If officers and/or directors are not listed in organizing instruments, a current membership list identifying officers and directors. If officer and/or director positions are unfilled, a statement signed by an officer indicating which positions are vacant. The Commission will compare the number of officers and directors included in the documents to the application to ensure all officers and directors have been disclosed. The Department of Public Safety will conduct a criminal history check on all officers, directors, and operators. Any officer, director, or operator not meeting the criminal history background requirement must resign before a license may be issued.
Section 2001.102 License Application Requirements.	If the organization is organized under the law of this state, the organization must be in good standing with the Secretary of State (SOS) The Commission will request additional documentation from the applicant if unable to validate good standing directly with the SOS.

Volunteer Fire Department:

Qualifications and Requirements	Necessary Documentation
Organized primarily to provide fire-fighting services.	Proof of membership in a professional fire fighting organization; Or Copy of a publication that lists the organization and its phone number to call in case of fire; Or A letter from a local government agency recognizing the organization as a volunteer fire department; Or A copy of all organizing instrument(s) which list this purpose for the organization; Or A dated newspaper article which details the organization's activities. The name of the applicant organization must match the name of the applicant on the documents submitted.
Must have been organized in Texas for at least three years.	If the applicant is affiliated with a state or national organization, Schedule G - Verification by Parent Organization. If the applicant is not affiliated with a state or national organization, a copy of a listing in a publication such as a national roster or newspaper article naming the organization; Or A letter to the applicant from a government agency. The document submitted must reflect the applicant's name, Texas address, and either be dated three years before the application date or establish the date the organization was founded.
Must operate fire-fighting equipment.	Pictures of fire equipment reflecting the name of the volunteer fire department; Or

	Copies of canceled checks or invoices for fire-fighting equipment.
May not pay members other than nominal compensation.	Most recent copy of IRS Form 990 if organization is required to file it with the Internal Revenue Service. Indicate on application if organization is not required to file Form 990. If not required to file Form 990, a copy of a volunteer fire fighter application; Or Copy of an organizing instrument that describes compensation of members.
Must demonstrate significant progress toward the accomplishment of the organization's purposes during the 12 months preceding the date of application.	Call List which shows the type of incident and location for the 12 month period prior to the date the application was signed.
May appoint only the organization's members to serve as operators.	Current membership list with all officers and directors noted. Membership list will be compared to the persons listed on application to confirm that only members have been named as operators.
Must ensure that all officers, directors, and operators have not been convicted of a felony, criminal fraud, a gambling or gambling-related offense, or a crime of moral turpitude if less than 10 years has elapsed since the termination of a sentence, parole, mandatory supervision, or community supervision served for the offense.	A signed and dated copy of the most recent version of all of the organization's organizing instruments that list the officer and director positions; Or If officers and/or directors are not listed in organizing instruments, a current membership list identifying officers and directors. If officer and/or director positions are unfilled, a statement signed by an officer indicating which positions are vacant. The Commission will compare the number of officers and directors included in the documents to the application to ensure all officers and directors have been disclosed. The Department of Public Safety will conduct a criminal history check on all officers, directors and operators. Any officer, director, or operator not meeting the criminal history background requirement must resign before a license may be issued.

Section 2001.102 License Application Requirements.	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation. If the organization is organized under the law of this state the organization must be in good standing with the Secretary of State (SOS). The Commission will request additional documentation from the applicant if unable to validate good standing directly with the SOS.

Veteran Organization:

Qualifications and Requirements	**Necessary Documentation**
Must be an unincorporated association or corporation.	A signed copy of the organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation. The name of the applicant organization must match the name of the organization on the organizing instruments.
Must hold a valid 501(c) exemption through the Internal Revenue Service. Must have been organized in Texas for at least three years.	If the Commission is unable to validate directly with the Internal Revenue Service that the organization has a 501(c) designation, the Commission will request additional documentation from the applicant. Schedule G - Verification by Parent Organization.
May not distribute any income to members, officers, or governing body except as reasonable compensation for services.	Most recent copy of IRS Form 990 if organization is required to file it with the Internal Revenue Service. Indicate on application if organization is not required to file Form 990.
Members must be veterans or dependents of veterans of the United States armed serves.	Schedule G - Verification by Parent Organization
Must be chartered by the United States Congress.	The Commission will review the list of chartered veteran organizations maintained by the United States Department of Veteran Affairs. Its website link is: http://www1.va.gov/vso/index.cfm?template=view.
Must be organized to advance the interest of veterans or active duty personnel of the US armed forces and their dependents.	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation. The name of the applicant organization must match the name of the organization on the organizing instruments.
Must demonstrate significant progress toward the accomplishment of the organization's purposes during the 12 months preceding the date of application.	At least three (3) different types of acceptable documents as proof that organization was engaged in furthering its charitable purpose for the time period beginning one year prior to the date the application was signed. Examples of acceptable documentation include copies of:

	1. activity reports filed with the state and/or national organization, 2. monetary donations to Veterans Administration (VA) hospitals, 3. letters of appreciation from veterans and/or organizations receiving benefits, 4. support of and/or contributions to veterans' funerals and/or their families, 5. visits to veteran's hospitals, 6. newspaper articles, and 7. Form 990. To establish the beginning date, an organization may submit documentation dated up to three months prior to the year before the application was signed in order to prove that the organization has been engaged in furthering its charitable purpose throughout the past twelve months. All documents must be dated and indicate the name of the organization.
May appoint only the organization's members to serve as operators.	A current membership list with all officers and directors noted. Membership list will be compared to the persons listed on the application to confirm that only members have been named as operators.
Must ensure that all of the organization's officers, directors and operators have not been convicted of a felony, criminal fraud, a gambling or gambling-related offense, or a crime of moral turpitude if less than 10 years has elapsed since the termination of a sentence, parole, mandatory supervision, or community supervision served for the offense.	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation that list the officer and director positions; Or If officers and/or directors are not listed in organizing instruments, a current membership list identifying officers and directors. If officer and/or director positions are unfilled, a statement signed by an officer indicating which positions are vacant. The Commission will compare the number of officers and directors included in the documents to the application to ensure all officers have been disclosed. The Department of Public Safety will conduct a criminal history check on all officers, directors and operators. Any officer, director, or operator not meeting the criminal history background requirement must resign before a license may be issued.
Section 2001.102 License Application	If the organization is organized under the law of this

Requirements.	state the organization must be in good standing with the Secretary of State (SOS). The Commission will request additional documentation from the applicant if unable to validate good standing directly with the SOS.

Fraternal Organization:

Qualifications and Requirements	Necessary Documentation
Must be an Unincorporated Association or Corporation.	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation. The name of the applicant organization must match the name of the organization on the organizing instruments.
Must be organized to perform and engage in charitable work.	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation. The name of the applicant organization must match the name of the organization on the organizing instruments.
Must hold a valid 501(c) exemption through the Internal Revenue Service.	If the Commission is unable to validate directly with the Internal Revenue Service that the organization has a 501(c) designation, the Commission will request additional documentation from the applicant.
May not distribute any income to members, officers, or governing body except as reasonable compensation.	Most recent copy of Internal Revenue Service (IRS) Form 990 if organization is required to file it with the IRS. Indicate on application if organization is not required to file Form 990. A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation.
Must have been organized in Texas for at least three years.	Schedule G - Verification by Parent Organization if affiliated with a state or national organization; Or A copy of a listing in a publication such as a national roster or newspaper article if not affiliated with a state or national organization; Or A letter to the applicant from a government agency. The document submitted to confirm the requirement must reflect organization's name, Texas address, and be either dated prior to the three year period or establish the date the organization was founded.

Must have a bona fide membership.	Current membership list with all officers and directors noted.
Membership actively and continuously engaged in furthering its authorized purposes for the past three years.	Organizing instrument(s) describing the organization's purposes. Copies of minutes from three annual membership meetings reflecting that the organization voted on the election of officers and reported on matters related to furthering the organization's purpose. Collectively, the three meeting minutes must encompass a (36) thirty-six month period (i.e. one per year). The meeting minutes must be dated and signed by an officer of the organization.
May not authorize or support a public office candidate.	Organizing instrument(s) reflecting that organization has not authorized support or opposition of a public office candidate.
Must demonstrate significant progress toward the accomplishment of the organization's purposes during the 12 months preceding the date of application.	At least three (3) different types of acceptable documents as proof that organization was engaged in furthering its charitable purpose for the time period beginning one year prior to the date the application was signed. Examples of acceptable documentation include copies of: 1. canceled checks, 2. newspaper articles, 3. brochures, 4. receipts, 5. meeting minutes, and 6. IRS Form 990. All documents must be dated and indicate the organization's name. To establish the beginning date, an organization may submit documentation dated up to three months prior to the year before the application was signed in order to prove that the organization has been engaged in furthering its charitable purposes throughout the past twelve months.
May appoint only the organization's members to serve as operators.	A current membership list with all officers and directors noted. Membership list will be compared to the persons listed on the application to confirm that only members have been named as operators.
Must ensure that all of the organization's officers, directors, and operators have not been convicted of a felony, criminal fraud, a gambling or gambling-related offense, or a crime of moral turpitude if less than 10 years has elapsed since the termination of	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation that list the officer and director positions; Or

a sentence, parole, mandatory supervision, or community supervision served for the offense.	If officers and/or directors are not listed in organizing instruments, a current membership list identifying officers and directors. If officer and/or director positions are unfilled, a statement signed by an officer indicating which positions are vacant. The Commission will compare the number of officers and directors included in the documents to the application to ensure all officers and directors have been disclosed. The Department of Public Safety will conduct a criminal history check on all officers, directors and operators. Any officer, director, or operator not meeting the criminal history background requirement must resign before a license may be issued.
Section 2001.102 License Application Requirements.	If the organization is organized under the law of this state, the organization must be in good standing with the Secretary of State (SOS). The Commission will request additional documentation from the applicant if unable to validate good standing directly with the SOS.

Volunteer Emergency Medical Services Provider:

Qualifications and Requirements	**Necessary Documentation**
Must have been organized in Texas for at least three years.	If the applicant is affiliated with a state or national organization, Schedule G - Verification by Parent Organization. If the applicant is not affiliated with a state or national organization, a copy of a listing in a publication such as a national roster or newspaper article naming the organization; Or A letter to the applicant from a government agency. The document submitted must reflect the applicant's name, Texas address, and either be dated three years before the application date or establish the date the organization was founded.
Must demonstrate that the organization has made significant progress toward the accomplishment of its purposes during the 12 months preceding the date of application.	A Call List which shows the type of incident and location for the 12 month period prior to the date the application was signed.

Must appoint only the organization's members to serve as operators for the organization.	A current membership list with all officers and directors noted. Membership list will be compared to the persons listed on the application to confirm that only members have been named as operators.
Must ensure that all of the organization's officers, directors and operators have not been convicted of a felony, criminal fraud, a gambling or gambling-related offense, or a crime of moral turpitude if less than 10 years has elapsed since the termination of a sentence, parole, mandatory supervision, or community supervision served for the offense.	A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation, that list the officer and director positions; Or If officers and/or directors are not listed in organizing instruments, a current membership list identifying officers and directors. If officer and/or director positions are unfilled, a statement signed by an officer indicating which positions are vacant. The Commission will compare the number of officers and directors included in the documents to the application to ensure all officers and directors have been disclosed. The Department of Public Safety will conduct a criminal history check on all officers, directors and operators. Any officer, director or operator not meeting the criminal history background requirement must resign before a license may be issued.
Section 2001.102 License Application Requirements.	Most recent copy of Internal Revenue Service (IRS) Form 990 if organization is required to file it with the IRS. Indicate on application if organization is not required to file Form 990; And A signed copy of the applicant organization's organizing instruments, including any bylaws, constitution, charter, and articles of incorporation; And If the organization is organized under the law of this state the organization must be in good standing with the Secretary of State (SOS). The Commission will request additional documentation from the applicant if unable to validate good standing directly with the SOS.

Figure: 19 TAC §229.3(f)(1)

Accountability System: Standards disaggregated by gender and ethnicity (see demographics chart)	**Report by Program**	**Report by State**	**Description of Data**	**Required Submission Date and Method of Reporting**
				19 TAC §229.4, Determination of Accreditation Status
1. Certification examinations		√	Pass Rate--As defined in 19 TAC §229.2(26).	Certification scores will be uploaded into the accountability system for educator preparation (ASEP) system and calculated by academic year (September 1-August 31).
2. Beginning teacher performance		√	Results of beginning teacher appraisals by school administrators.	Online survey will be completed by school administrators by June 15 of each applicable year.
3. Student achievement		√	Improvement of student performance taught by beginning teachers for the first three years.	Date and method of collection when available.
4. Ongoing support by field supervisors to beginning teachers during their first year in the classroom	√	√	Data collections regarding frequency, duration, and quality of field supervision	EPP will enter information in the ASEP system by September 15 of each year, documenting each field supervision contact by entering the following information: 1) teacher; 2) date of contact with teacher; 3) time of contact; and 4) documentation provided.
Annual Performance Report disaggregated by gender and ethnicity: (Appendix - demographics chart)	**Report by Program**	**Report by State**	**Description of Data**	**Required Submission Date and Method of Reporting**
				19 TAC §229.3, Required Submissions of Information, Surveys, and Other Data
1. Number of EPP applicants	√		Report submitted by the EPP and included on the consumer information section of the TEA website.	EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic year.
2. Number of EPP candidates admitted	√		Report submitted by the EPP and included on the consumer information section of the TEA website.	EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic year.
3. Number of candidates retained in the EPP	√		Report submitted by the EPP and included on the consumer	EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic

			information section of the TEA website.	year.
4. Number of candidates completing all EPP requirements		√	Report submitted by the EPP and included on the consumer information section of the TEA website.	EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic year.
5. Number of EPP candidates retained in the profession		√	Report submitted by the EPP and included on the consumer information section of the TEA website.	EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic year.
6. Number of EPP candidates employed		√	Report included on the consumer information section of the TEA website.	TEA staff will generate a report utilizing ASEP system and Public Education Information Management System (PEIMS) data.
7. All information required by federal law	√		Report submitted by the EPP and included on the consumer information section of the TEA website.	EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic year.
Consumer Information to be Posted on the TEA website:	**Report by Program**	**Report by State**	**Description of Data**	**Required Submission Date and Method of Reporting**
				19 TAC §229.3, Required Submissions of Information, Surveys, and Other Data
1. EPP status based on adherence to the standards		√	Accountability Status: standards disaggregated by gender and ethnicity. (see Appendix) To be posted on the TEA website in the consumer information section for each EPP.	All information will be posted annually on the TEA website in the consumer information section.
2. Annual Performance Report of each EPP	√	√	Seven data elements submitted by EPPs as required by TEC, §21.045(b). Information to be posted on the TEA website in the consumer information section for each EPP.	EPP will upload file or enter all elements of this section into ASEP system by September 15 for the preceding academic year. All information will be posted annually on the TEA website in the consumer information section.
3. Quality of persons admitted to the EPP:	√		To be posted on the TEA website in the consumer information section for each EPP.	All information will be posted on the TEA website in the consumer information section.
a. Individual	√		Required and calculated by EPP.	EPP will enter into the ASEP system by September 15 for the

overall GPA				preceding academic year. For assistance in calculating the GPA: http://www.onlineconversion.com/grade_point_average.htm. EPP will upload a data file or enter all elements of this section into ASEP system by September 15 for the preceding academic year.
b. Individual GPA in specific subject area	√		Required and calculated for core subject areas per No Child Left Behind (NCLB) requirements.	EPP will enter into the ASEP system by September 15 for the preceding academic year. For assistance in calculating the GPA: http://www.onlineconversion.com/grade_point_average.htm.
c. Average overall GPA for the EPP		√		ASEP system will calculate the overall average GPA by EPP by September 15 for the preceding academic year.
d. Average overall GPA in subject areas by EPP		√		ASEP system will calculate the overall average GPA by EPP.
*** EPP will report ONE of the following of rows e through i for each candidate.**				
e. Individual total GRE® score and date	√		EPP will need to report the total score and the date. The GRE® has been updated and will require dates.	EPP will enter into data fields in the ASEP system by September 15 for the preceding academic year.
f. Individual total SAT® score and date	√		EPP will need to report the total score and the date. The SAT® has been updated and will require dates.	EPP will enter into data fields in the ASEP system by September 15 for the preceding academic year.
g. Individual ACT® score and date	√		EPP will need to report the total score and the date. The ACT® has been updated and will require dates.	EPP will enter into data fields in the ASEP system by September 15 for the preceding academic year.
h. Individual Texas Academic Skills Program® (TASP®)/Texas Higher Education Assessment®	√			EPP will enter into data fields in the ASEP system by September 15 for the preceding academic year.

(THEA®) score and date				
i. ☐ None of the above		√		EPP will enter the number of candidates who qualify under the Texas Success Initiative (Texas Education Code, §51.3062) into the ASEP system by September 15 for the preceding academic year.
j. Average total GRE® score per EPP		√		EPP will enter into the ASEP system by September 15 for the preceding academic year. ASEP system will calculate the overall average GRE® by date and by EPP
k. Average total SAT® score per EPP		√		EPP will enter into the ASEP system by September 15 for the preceding academic year. ASEP system will calculate the overall average SAT® by date and by EPP
l. Average total ACT® score per EPP		√		EPP will enter into the ASEP system by September 15 for the preceding academic year. ASEP system will calculate the overall average ACT® by date and by EPP
m. Average total TASP®/THEA® score per EPP		√		EPP will enter into the ASEP system by September 15 for the preceding academic year. ASEP system will calculate the overall average TASP®/THEA® by EPP.
4. Candidates who are counted as finishing the EPP for pass rate purposes and who are successful in obtaining teaching positions		√	To be posted on the TEA website in the consumer information section for each EPP.	TEA will report candidates by EPP who have been issued a certificate and are identified in PEIMS as teacher of record.
5. Preparation of general education and special education teachers to effectively teach:			To be posted on the TEA website in the consumer information section for each EPP.	EPP assurances of compliance and the number of training/coursework hours will be entered into the ASEP system by September 15 for the preceding academic year.
a. Students with disabilities	√			EPP will provide assurances of compliance in the ASEP system by September 15 for the preceding academic year.
b. Students of limited English proficiency	√			EPP will provide assurances of compliance in the ASEP system by September 15 for the preceding academic year.

6. Activities offered by EPP to prepare teachers:			To be posted on the TEA website in the consumer information section for each EPP.	Data will be entered annually for the preceding academic year.
a. Integrate technology effectively into curricula and instruction including activities consistent with the principles of universal design for learning	√			EPP will provide assurances of compliance and the number of training/coursework hours in the ASEP system by September 15 for the preceding academic year.
b. Integrate technology effectively to collect, manage, and analyze data to improve teaching and learning for the purpose of increasing student academic achievement	√			EPP will provide assurances of compliance and the number of training/coursework hours in the ASEP system by September 15 for the preceding academic year.
7. Perseverance of beginning teachers in the profession for at least three years after certification as active members in the Teacher Retirement System of Texas (TRS)		√	To be posted on the TEA website in the consumer information section for each EPP.	TEA will obtain candidates by EPP who have been issued a certificate and are identified in PEIMS as teacher of record and the TRS. Results will be posted annually for the preceding academic year.

8. Results of exit surveys from EPP participants at the completion of the program that evaluate the program's effectiveness in preparing participants to succeed in the classroom		√	To be posted on the TEA website in the consumer information section for each EPP.	EPP participants will respond to an online survey presented at the time they apply for certification. Results will be posted annually by August 1 for the preceding academic year.
9. Results of surveys from school principals that evaluate the EPP's effectiveness in preparing participants to succeed in the classroom		√	To be posted on the TEA website in the consumer information section for each EPP.	Principals or designated administrators will complete by June 15, for the preceding academic year, individual teacher performance surveys for each beginning teacher who participated in an EPP. The online survey will be administered and collected by TEA. Results will be posted on the TEA website under consumer information.
10. Identify employment opportunities for teachers in the various regions of the state including shortage areas		√		TEA will provide employment information in various regions of Texas. TEA will identify teacher shortage areas. The information will be provided on the TEA website. Information will be updated annually for the preceding academic year.
Data Elements Reported to the Higher Education Opportunity Act (HEOA):	**Report by Program**	**Report by State**	**Description of Data**	**SB 174, Texas Education Code (TEC), §21.045(b)(7), Federal Reporting HEOA and Title II Reporting Web site https://title2.ed.gov/default.asp**
Section I: Educator Preparation Program Information				
1. Admission Data:			EPPs report if they require the following criteria for admitting participants:	EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
a. Application	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.

b. Fee/payment	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
c. Transcript	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
d. Fingerprint check	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
e. Background check	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
f. Experience in a classroom working with students	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
g. Minimum number of clock-hours completed	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
h. Minimum high school GPA	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
i. Minimum undergraduate GPA	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
j. Minimum GPA in content area coursework	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
k. Minimum GPA in professional education coursework	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
l. Minimum ACT® score	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
m. Minimum SAT®	√	√		EPP will enter the data into a data field in the ASEP system. All

score				data must be completed by October 1 for the preceding academic year.
n. Minimum GRE® score	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
o. Minimum basic skills test score	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
p. Subject area/academic content test or other subject matter verification	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
q. Minimum Miller Analogies Test score	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
r. Recommenda-tion(s)	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
s. Essay or personal statement	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
t. Interview	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
u. Resume	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
v. Baccalaureate degree or higher	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
w. Job offer from school/district	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
x. Personality test (e.g. Myers-	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding

Briggs Assessment)				academic year.
y. Other (specify:_____ _____ _____)	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
2. EPP Website	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
3. Time when individuals are formally admitted to the initial teacher certification program (freshman, sophomore, junior or senior year)	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
4. Does your EPP conditionally admit candidates?	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
5. Number of candidates enrolled by gender and ethnicity	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
6. Supervised clinical experience:	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
a. Average number of clock-hours prior to student/clinical teaching	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
b. Number of clock-hours required for student/clinical teaching	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
c. Number of full-time equivalent	√			EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding

faculty in supervised clinical experience during this academic year (IHE and Pre K-12)				academic year.
d. Number of candidates in supervised clinical experience during the academic year	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
7. Number of candidates who have been certified as teachers by subject and certification for three years	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1. TEA will extract the data and send to the certification testing vender.
8. Total number of initial teacher certification program completers for three years	√	√		EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1. TEA will extract the data and send to the certification testing vender.
Section II: Goals and Assurances			EPPs will provide quantifiable goals with assurances.	EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
1. Annual quantifiable goals for increasing the number of prospective teachers trained in teacher shortage areas				EPP will enter the data into a data field in the ASEP system. All data must be completed by October 1 for the preceding academic year.
a. Math	√			
b. Science	√			
c. Special Education	√			

d. Instruction of limited English proficient (LEP) students	√			TEA will collect data regarding English language learner (ELL) students and also assurances of compliance. EPPs will enter this data into the ASEP system by October 1 for the preceding academic year.
e. Other (specify:_____ _____ _____)	√			
2. Assurances:				
a. Training provided to prospective teachers. Responds to the identified needs of the local educational agencies or States where the institution's graduates are likely to teach, based on past hiring and recruitment trends.	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.
b. Training provided to prospective teachers is closely linked with the needs of schools and the instructional decisions new teachers face in	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.

the classroom.				
c. Prospective special education teachers receive coursework in core academic subjects and receive training in providing instruction in core academic subjects.	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.
d. General education teachers receive training in providing instruction to students with disabilities.	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.
e. General education teachers receive training in providing instruction to limited English proficient students.	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.
f. General education teachers receive training in providing instruction to	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.

students from low-income families.				
g. Prospective teachers receive training on how to effectively teach in urban and rural schools, as applicable.	√			EPPs will enter data into the ASEP system by October 1 for the preceding academic year.
Section III: Pass rates and scaled scores			Based on only teacher certification tests.	
1. Assessment of pass rates for the academic year		√		Certification test vendor will provide reports by EPP.
2. Summary pass rates for three years		√		Certification test vendor will provide reports by EPP
Section IV: Statement and Designation as Low-Performing				
1. EPP approval		√	TEA will determine the status of an EPP.	TEA will determine the status of an EPP through the implementation of the standards specified in 19 TAC §229.4(a)(1)-(4), for the preceding academic year.
2. EPP accredited		√		TEA will determine the status of an EPP through the implementation of the standards specified in 19 TAC §229.4(a)(1)-(4),for the preceding academic year.
Section V: Use of Technology - Prepare teachers to:			TEA will collect data and post on the TEA website in the consumer information section of the website.	
1. Integrate technology effectively into curricula	√	√		EPPs will enter data regarding the use of technology into the ASEP system by October 1 for the preceding academic year.

and instruction.				
2. Use technology effectively to collect data to improve teaching and learning.	√	√		EPPs will enter data regarding the use of technology into the ASEP system by October 1 for the preceding academic year.
3. Use technology effectively to manage data to improve teaching and learning.	√	√		EPPs will enter data regarding the use of technology into the ASEP system by October 1 for the preceding academic year.
4. Use technology effectively to analyze data to improve teaching and learning.	√	√		EPPs will enter data regarding the use of technology into the ASEP system by October 1 for the preceding academic year.
Section VI: Teacher Training			TEA will collect data and post on the TEA website in the consumer information section of the website.	
1. Teach students with disabilities effectively.	√	√		EPPs will enter data regarding students with disabilities into the ASEP system by October 1 for the preceding academic year.
2. Participate as a member of an individualized education program team.	√	√		EPPs will enter data regarding students with disabilities into the ASEP system by October 1 for the preceding academic year.
3. Teach students who are limited English proficient effectively.	√	√		EPPs will enter data regarding the teaching of students who have limited English proficiency into the ASEP system by October 1 for the preceding academic year.
4. Teach students with disabilities effectively.	√	√		EPPs will enter data regarding teaching students who have learning disabilities into the ASEP system by October 1 for the preceding academic year.
5. Participate as a member of an individualized education program team.	√	√		EPPs will enter data regarding teaching students who have learning disabilities into the ASEP system by October 1 for the preceding academic year.
6. Teach students who are limited English proficient effectively.	√	√		EPPs will enter data regarding the teaching of students who have limited English proficiency into the ASEP system by October 1 for the preceding academic year.

Appendix
Demographics Guidelines

Starting with the 2009-2010 academic year, ASEP will collect ethnicity and race information for candidates using the 1977 categories as well as using the new federal categories developed in 1997 as required by the United States Department of Education (USDE). The new federal category system requires that ethnicity and race be collected separately. It allows individuals to select multiple races. It requires all responses to be collected, but when reporting aggregate data to the USDE, a different set of categories is used for aggregate reporting. In the 2010-2011 academic year, Educator Preparation programs will report this information using the new categories only. The new categories are as follows:

Ethnicity	Race
Hispanic or Latino	American Indian or Alaska Native
Not Hispanic or Latino	Asian
	Black or African American
	Hawaiian or other Pacific Islander
	White

Aggregate Reporting Categories
Hispanic or Latino
American Indian or Alaska Native
Asian
Black or African American
Hawaiian or Other Pacific Islander
White
Two or more races

Figure: 22 TAC §213.33(b)

Texas Board of Nursing Disciplinary Matrix

In determining the appropriate disciplinary action, including the amount of any administrative penalty to assess, the Board will consider the threat to public safety, the seriousness of the violation, and any aggravating or mitigating factors. The Board currently lists factors to be considered in Rule 213.33, published at 22 Tex. Admin. Code §213.33. The Matrix may list additional aggravating or mitigating factors which may be considered in addition to the factors listed in Rule 213.33. Further, any aggravating or mitigating factors that may exist in a particular matter, but which are not listed in this Matrix or Rule 213.33, may also be considered by the Board, pursuant to the Occupations Code Chapters 53 and 301.

Additionally, the Board shall consider whether the person is being disciplined for multiple violations of either Chapter 301 or a rule or order adopted under Chapter 301; or has previously been the subject of disciplinary action by the Board and has previously complied with Board rules and Chapter 301. Further, the Board will consider the seriousness of the violation, the threat to public safety, and any aggravating or mitigating factors.

If the person is being disciplined for multiple violations of either Chapter 301, or a rule or order adopted under Chapter 301, the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a single violation; and

If the person has previously been the subject of disciplinary action by the Board, the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a person who has not previously been the subject of disciplinary action by the Board.

The Board may assess administrative penalties as outlined in 22 Tex. Admin. Code §213.32.

Although not addressed by this Matrix, the Board may also seek to assess costs of a contested case proceeding authorized by the Occupations Code §301.461.

Although not addressed by this Matrix, the Occupations Code §301.4521 authorizes the Board to require an individual to submit to an evaluation if the Board has probable cause to believe that the individual is unable to safely practice nursing due to physical impairment, mental impairment, chemical dependency, or abuse of drugs of alcohol. Section 301.4521 also authorizes the Board to request an individual to submit to an evaluation for other reasons, such as reported unprofessional conduct, lack of good professional character, or prior criminal history. The Board's rules regarding evaluations are published at 22 Tex. Admin. Code §213.29, §213.30, and §213.33.

Adopted October, 2009

This Matrix is also applicable to the determination of an individual's eligibility for licensure under the Occupations Code §301.257.

§301.452(b)(1) a violation of Chapter 301, a rule or regulation not inconsistent with Chapter 301, or an order issued under Chapter 301;		
First Tier Offense: Isolated failure to comply with procedural Board rule, such as failure to renew license within six (6) months of its due date/renewal date or failure to complete continuing competency requirements*. Failure to comply with a technical, non-remedial requirement in a prior Board order or stipulation, such as failure to timely pay fine, failure to timely complete remedial education stipulation, missed employer reports, or employer notification forms.	Sanction Level I: Remedial Education, with or without a fine of $250.00 or more for each additional violation. If stipulations in prior Board order are still outstanding, full compliance with and continuation of prior Board order and a fine of $250 or more for each additional violation.	Sanction Level II: Warning or Reprimand with Stipulations that may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities, periodic board review; and/or a fine of $500 or more for each additional violation.
Second Tier Offense: Failure to comply with a substantive requirement in a prior Board order or stipulation. Substantive requirements are those stipulations in a Board Order designed to remediate, verify, or monitor the competency issue raised by the documented violation. Any violation of Board order that could pose a risk of harm to patients or public. Practice on a delinquent license for over two (2) years, but less than four (4) years.	Sanction Level I: Requirement to complete conditions of original Board order and a fine of $500.00 or more for each additional violation. Respondent may be subject to next higher sanction and an extension of the stipulations. Violations of stipulations that are related to alcohol or drug misuse will result in next higher administrative sanction (ex: a violation of a Board approved Peer Assistance Order may result in an Enforced Suspension until the nurse receives treatment and obtains one (1) year of sobriety and then probation of the license with a fine and drug stipulations for three (3) years).	Sanction Level II: Denial of Licensure, Suspension, Revocation, or Voluntary Surrender.

Adopted October, 2009

Third Tier Offense:	Sanction Level I:	Sanction Level II:
Violation of substantive probationary restriction required in a Board Order that limits the practice setting or scope of practice. Failing to comply with substantive probationary restriction required in a Board Order; for example, repeated failure to submit to random drug screens or intentional submission of false or deceptive compliance evidence. Substantive requirements are those stipulations in a Board Order designed to remediate, verify, or monitor the competency issue raised by the documented violation.	Revocation or Voluntary Surrender.	Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.
Aggravating Circumstances for **§301.452(b)(1)**: Multiple offenses; continued failure to register for available remedial classes; recurring failure to provide information required by order; patient vulnerability, impairment at time of incident, failure to cooperate with compliance investigator.		
Mitigating Circumstances for **§301.452(b)(1)**: Unforeseen financial or health issues; not practicing nursing during stipulation period.		
* Denotes a violation that is subject to disciplinary action, but may be eligible for a corrective action agreement (non-disciplinary action). The sanctions contained in this Matrix are disciplinary actions. Board rules regarding corrective actions (non-disciplinary actions) are located at 22 Tex. Admin. Code §213.32 and are not applicable to this Matrix. Further, a corrective action is not available as a sanction in a disciplinary action.		

§301.452(b)(2) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing;		
First Tier Offense:	Sanction Level I:	Sanction Level II:
Failure to honestly and accurately provide information that may have affected the Board determination of whether to grant a license. *	Remedial Education and/or a fine of $250 or more for each additional violation.	Denial of Licensure or Revocation of nursing license.

Adopted October, 2009

Second Tier Offense: Intentional misrepresentation of previous nurse licensure, education, extensive criminal history, multiple violations/offenses, an offense which is listed in the Occupations Code §301.4535, or professional character, including when license has been or is requested to be issued based on fraudulent diploma or fraudulent educational transcript.	Sanction Level I: Denial of Licensure or Revocation of nursing license.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455, which may ultimately result in revocation.
Aggravating Circumstances for **§301.452(b)(2):** Multiple offenses; the relevance or seriousness of the hidden information, whether the hidden information, if known, would have prevented licensure.		
Mitigating Circumstances for **§301.452(b)(2):**Seriousness of the hidden violation; age of applicant at time applicant committed violation; and applicant's justified reliance upon advice of legal counsel.		
* Denotes a violation that is subject to disciplinary action, but may be eligible for a corrective action agreement (non-disciplinary action). The sanctions contained in this Matrix are disciplinary actions. Board rules regarding corrective actions (non-disciplinary actions) are located at 22 Tex. Admin. Code §213.32 and are not applicable to this Matrix. Further, a corrective action is not available as a sanction in a disciplinary action.		

§301.452(b)(3) a conviction for, or placement on deferred adjudication, community supervision, or deferred disposition for, a felony or for a misdemeanor involving moral turpitude;

Eligibility and Discipline will be reviewed under Board's Disciplinary Guidelines for Criminal Conduct published at http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html. The Board will also utilize 22 Tex. Admin. Code 213.28, the Occupations Code §301.4535, and the Occupations Code Chapter 53, including §53.021(b), which provides that a license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

Adopted October, 2009

§301.452(b)(4) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; Eligibility and Discipline will be reviewed under the Board's Disciplinary Guidelines for Criminal Conduct published at http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html. The Board will also utilize 22 Tex. Admin. Code §213.28, the Occupations Code §301.4535, and the Occupations Code Chapter 53, including §53.021(b), which provides that a license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

§301.452(b)(5) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered;		
	Sanction: Issuance of Cease and Desist Order with referral of all information to local law enforcement.	

301.452(b)(6) impersonating or acting as a proxy for another person in the licensing examination required under Section 301.253 or 301.255;		
	Sanction: **Revocation** of license for this offense.	

§301.452(b)(7) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing;

First Tier Offense: Negligently or Recklessly aiding an unlicensed person in connection with unauthorized practice. For example, failing to verify credentials of those who are supervised by the nurse* or allowing Certified Nurse Aids to administer medications or otherwise practice beyond their appropriate scope.	Sanction Level I: Remedial Education and/or a fine of $250 for a single or isolated incident. When there exists chronic violations or multiple violations then Warning or Reprimand with Stipulations that may include remedial education; supervised practice; limit specific nursing activities; periodic board review; and/or a fine of $250 or more for each additional violation.	Sanction Level II: Denial of Licensure, Revocation or Voluntary Surrender when omission or violation is associated with high risk of patient injury or death.
Second Tier Offense: Knowingly aiding an unlicensed person in connection with unauthorized practice of nursing.	Sanction Level I: Denial of Licensure, Revocation or Voluntary Surrender.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455, which may ultimately result in revocation.
Aggravating Circumstances of **§301.452(b)(7)**: Multiple offenses, intentional violation of institutional and BON rules, patient harm or risk of harm.		
Mitigating Circumstances of **§301.452(b)(7)**: The existence of institutional policies that allow certain practices by unlicensed persons with certified competency.		
* Denotes a violation that is subject to disciplinary action, but may be eligible for a corrective action agreement (non-disciplinary action). The sanctions contained in this Matrix are disciplinary actions. Board rules regarding corrective actions (non-disciplinary actions) are located at 22 Tex. Admin. Code §213.32 and are not applicable to this Matrix. Further, a corrective action is not available as a sanction in a disciplinary action.		

§301.452(b)(8) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction;

First Tier Offense: Action in another jurisdiction results from a default order issued due to the nurse's failure to answer violations, and the violations are not those in which the other jurisdiction or Texas would have revoked the license but for the nurse's failure to respond. Action in another jurisdiction is based on alcohol or substance misuse and the nurse is otherwise eligible for a stipulation of the license based on Board's rules and alcohol or substance misuse policy. http://www.bon.state.tx.us/disciplinaryaction/dsp.html.	Sanction Level I: Warning or Reprimand with Stipulations, which may include remedial education; supervised practice; perform public service; verified abstinence from unauthorized use of drugs and alcohol to be verified through urinalysis; limit specific nursing activities; and/or periodic board review. Order to participate in Board approved peer assistance program. Action should be at least consistent with action from other jurisdiction.	Sanction Level II: Revocation, Suspension, or Denial of Licensure when the individual doesn't respond or is not eligible for stipulated license. Action should be at least consistent with action from other jurisdiction.
Second Tier Offense: Revocation in another jurisdiction based on practice violations or unprofessional conduct that could result in similar sanction (revocation) in Texas.	Sanction Level I: Revocation, denial of licensure, or voluntary surrender.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.
Aggravating Circumstances for **§301.452(b)(8)**: Multiple offenses, patient vulnerability, impairment during the incident, the nature and seriousness of the violation in the other jurisdiction, and patient harm or risk of harm associated with the violation, criminal conduct.		
Mitigating Circumstances for **§301.452(b)(8)**: Nurse's failure to defend against the notice of violations and the resulting default order was not result of conscious indifference. The nurse has a meritorious defense against the unanswered violations outlined in the default order.		

Adopted October, 2009

§301.452(b)(9) intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient;		
First Tier Offense: Misuse of drugs or alcohol without patient interaction and no risk of patient harm or adverse patient effects. No previous history of misuse and no other aggravating circumstances.	Sanction Level I: Referral to a Board approved peer assistance program for nurses pursuant to Board rules and policy on alcohol or substance abuse or misuse. http://www.bon.state.tx.us/disciplinaryaction/dsp.html.	Sanction Level II: For individuals receiving a diagnosis of no chemical dependency and/or no substance abuse/misuse, Warning with Stipulations that may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities and/or periodic board review. Appropriate when individual declines participation in peer assistance program or are otherwise ineligible for the program.

Adopted October, 2009

Second Tier Offense:	Sanction Level I:	Sanction Level II:
Misuse of drugs or alcohol without patient interaction and no risk of patient harm or adverse patient effects. However, individual has a previous history of peer assistance program participation or previous Board order.	Board ordered participation in a Board approved peer assistance program for nurses pursuant to Board rules and policy on alcohol or substance abuse or misuse. Includes individuals with non disciplinary history of peer assistance participation. http://www.bon.state.tx.us/disciplinaryaction/dsp.html. For individuals receiving a diagnosis of no chemical dependency and/or no substance abuse/misuse, Reprimand with Stipulations which may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities, and/or periodic board review.	Suspension of License until treatment and verifiable proof of at least one year sobriety; thereafter a stay of suspension with stipulations that may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities, and/or periodic board review. Includes individuals with prior disciplinary history with peer assistance participation. For individuals receiving a diagnosis of no chemical dependency and/or no substance abuse/misuse, Suspension of License, which shall be probated, and stipulations which may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities, and/or periodic board review. Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.

Adopted October, 2009

Third Tier Offense: Misuse of drugs or alcohol with a risk of patient harm or adverse patient effects. Misuse of drugs or alcohol and other serious practice violation noted.	Sanction Level I: Referral to a Board approved peer assistance program if no actual patient harm, no previous history of drug or alcohol misuse, and no other aggravating circumstances. Board ordered participation in an approved peer assistance program if no actual patient harm and no other aggravating circumstances. For individuals receiving a diagnosis of no chemical dependency and/or no substance abuse/misuse, Warning or Reprimand with Stipulations that may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities, and/or periodic board review. Denial of Licensure until applicant establishes he/she has received treatment and demonstrates one (1) year of verifiable sobriety, then license with stipulations that include supervision; limited practice; abstention from drugs/alcohol; and random drug testing through urinalysis.	Sanction Level II: Suspension of License until treatment, verifiable proof of at least one year sobriety, thereafter a stay of suspension with stipulations that may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities; and/or periodic board review. For individuals receiving a diagnosis of no chemical dependency and/or no substance abuse/misuse, Suspension of License, which shall be probated, and stipulations which may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities, and/or periodic board review. Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.

Adopted October, 2009

Fourth Tier Offense:	Sanction Level I:	Sanction Level II:
Misuse of drugs or alcohol with serious physical injury or death of a patient or a risk of significant physical injury or death.	Denial of Licensure, Revocation or Voluntary Surrender.	Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.
Aggravating Circumstances for **§301.452(b)(9)**: Actual harm; severity of harm; number of events; illegal substance; criminal action; criminal conduct or criminal action involved, criminal justice probation; inappropriate use of prescription drug; unsuccessful / repeated treatment; concurrent diversion violations. Ineligible to participate in approved peer assistance program because of program policy or Board policy.		
Mitigating Circumstances for **§301.452(b)(9)**: Self-remediation, including participation in inpatient treatment, intensive outpatient treatment, and after care program. Verifiable proof of sobriety by random, frequent drug/alcohol screens.		

§301.452(b)(10) unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public;		
First Tier Offense:	Sanction Level I:	Sanction Level II:
Isolated failure to comply with Board rules regarding unprofessional conduct resulting in unsafe practice with no adverse patient effects. Isolated violation involving minor unethical conduct where no patient safety is at risk, such as negligent failure to maintain client confidentiality or failure to honestly disclose or answer questions relevant to employment or licensure.*	Remedial Education and/or a fine of $250 or more for each additional violation. Elements normally related to dishonesty, fraud or deceit are deemed to be unintentional.	Warning with Stipulations that may include remedial education; supervised practice; perform public service; limit specific nursing activities; and/or periodic Board review; and/or a fine of $500 or more for each additional violation. Additionally, if the isolated violations are associated with mishandling or misdocumenting of controlled substances (with no evidence of impairment) then stipulations may include random drug screens to be verified through urinalysis and practice limitations.

Second Tier Offense: Failure to comply with a substantive Board rule regarding unprofessional conduct resulting in serious risk to patient or public safety. Repeated acts of unethical behavior or unethical behavior which places patient or public at risk of harm. Personal relationship that violates professional boundaries of nurse/patient relationship.	Sanction Level I: Warning or Reprimand with Stipulations which may include remedial education, supervised practice, and/or perform public service. Fine of $250 or more for each violation. If violation involves mishandling or misdocumenting of controlled substances, misdemeanor crimes or criminal conduct involving alcohol, drugs or controlled substances, then the stipulations will also include abstention from unauthorized use of drugs and alcohol, to be verified by random drug testing through urinalysis, limit specific nursing activities, and/or periodic Board review. Board will use its rules and disciplinary sanction polices related to drug or alcohol misuse in analyzing facts. http://www.bon.state.tx.us/disciplinaryaction/dsp.html.	Sanction Level II: Denial of Licensure, Suspension, or Revocation of Licensure. Any Suspension would be enforced at a minimum until nurse pays fine, completes remedial education and presents other rehabilitative efforts as prescribed by the Board. If violation involves mishandling of controlled substances, misdemeanor crimes or criminal conduct involving alcohol, drugs or controlled substances then suspension will be enforced until individual has completed treatment and one year verifiable sobriety before suspension is stayed, thereafter the stipulations will also include abstention from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities and/or periodic Board review. Probated suspension will be for a minimum of two (2) or three (3) years with Board monitored and supervised practice depending on applicable Board policy. Financial exploitation of a patient or public will require full restitution before nurse is eligible for unencumbered license.

Adopted October, 2009

Third Tier Offense: Failure to comply with a substantive Board rule regarding unprofessional conduct resulting in serious patient harm. Repeated acts of unethical behavior or unethical behavior which results in harm to the patient or public. Sexual or sexualized contact with patient. Physical abuse of patient. Financial exploitation or unethical conduct resulting in a material or financial loss to a patient of public in excess of $4,999.99.	Sanction Level I: Denial of licensure or revocation of nursing license. Nurse or individual is not subject to licensure or reinstatement of licensure until restitution is paid.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.
Aggravating Circumstances for **§301.452(b)(10)**: Number of events, level of material or financial gain, actual harm, severity of harm, prior complaints or discipline for similar conduct, patient vulnerability, involvement of or impairment by alcohol, illegal drugs, or controlled substances or prescription medications, criminal conduct.		
Mitigating Circumstances for **§301.452(b)(10)**: Voluntary participation in established or approved remediation or rehabilitation program and demonstrated competency, full restitution paid.		
* Denotes a violation that is subject to disciplinary action, but may be eligible for a corrective action agreement (non-disciplinary action). The sanctions contained in this Matrix are disciplinary actions. Board rules regarding corrective actions (non-disciplinary actions) are located at 22 Tex. Admin. Code §213.32 and are not applicable to this Matrix. Further, a corrective action is not available as a sanction in a disciplinary action.		

§301.452(b)(11) adjudication of mental incompetency;		
	Sanction Level I: Denial of licensure or revocation of nursing license.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455, which may ultimately result in revocation.

Adopted October, 2009

§301.452(b)(12) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or		
First Tier Violation: A physical condition or diagnosis of schizophrenia and or other psychotic disorder, bi-polar disorder, paranoid personality disorder, anti-social personality disorder, and/or borderline personality disorder without patient involvement or harm; but less than two years of compliance with treatment and less than two years of verifiable evidence of competent functioning.	Sanction Level I: Referral to the Board approved Peer Assistance Program or Warning with Stipulations for a minimum of one (1) year to include therapy and appropriate treatment and monitored practice that may include remedial education, supervised practice, perform public service, abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis, limit specific nursing activities and/or periodic Board review.	Sanction Level II: Denial of license or Suspension of license until individual is able to provide evidence of competency, then probation that may include remedial education, supervised practice, perform public service, abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis, limit specific nursing activities and/or periodic Board review.
Second Tier Violation: Lack of fitness based on any mental health or physical health condition with potential harm or adverse patient effects or other serious practice violations. "Lack of fitness" includes observed behavior that includes, but is not limited to: slurred speech, unsteady gait, sleeping on duty, inability to focus or answer questions appropriately.	Sanction Level I: With evidence of drug or alcohol misuse: Refer to Sanctions in §301.452(b)(9). Warning or Reprimand with Stipulations for a minimum of one (1) year to include supervision, therapy, and monitored practice that may include remedial education, supervised practice, perform public service, abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis, limit specific nursing activities and/or periodic Board review.	Sanction Level II: With evidence of drug or alcohol misuse: Refer to Sanctions in 301.452(b)(9). Denial of license or Suspension of license until individual is able to provide evidence of competency, then probation that may include remedial education; supervised practice; perform public service; abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities and/or periodic Board review.

Adopted October, 2009

Third Tier Violation: Lack of fitness based on any mental health or physical health condition with evidence of patient harm, significant risk of harm, or other serious practice violations.	Sanction Level I: Denial of licensure or revocation of nursing license.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.
Aggravating Circumstances of **§301.452(b)(12)**: Seriousness of mental health diagnosis, multiple diagnosis, recent psychotic episodes, lack of successful treatment or remediation, number of events or hospitalization, actual harm, severity of harm, prior complaints or discipline for similar conduct.		
Mitigating Circumstances of **§301.452(b)(12)**: Self report, length of time since condition was relevant, successful response to treatment, positive psychological/chemical dependancy evaluation from a board approved evaluator who has opportunity to review the Board's file.		

§301.452(b)(13) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm.		
First Tier Offense: Practice below standard with a low risk of patient harm.	Sanction Level I: Remedial Education and/or fine of $250 when there is isolated incident or a fine of more than $250 for each additional violation.	Sanction Level II: Warning or Reprimand with Stipulations that may include remedial education, supervised practice, perform public service, abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis, limit specific nursing activities and/or periodic board review and/or fine of $500 or more for each additional violation.

Second Tier Offense: Practice below standard with patient harm or risk of patient harm.	Sanction Level I: Warning or Reprimand with Stipulations that may include supervised practice, limited specific nursing activities and/or periodic board review and/or a fine of $500 or more for each additional violation.	Sanction Level II: Denial, suspension of license, revocation of license, or request for voluntary surrender.
Third Tier Offense: Practice below standard with a serious risk of harm or death that is known or should be known. Act or omission that demonstrates level of incompetence such that the person should not practice without remediation and subsequent demonstration of competency. In addition, any intentional act or omission that risks or results in serious harm.	Sanction Level I: Denial, suspension of license; revocation of license or request for voluntary surrender.	Sanction Level II: Emergency Suspension of nursing practice in light of violation that may be a continuing and imminent threat to public health and safety pursuant to the Occupations Code §301.455 or §301.4551, which may ultimately result in revocation.
Aggravating Circumstances for **§301.452(b)(13)**: Number of events, actual harm, impairment at time of incident, severity of harm, prior complaints or discipline for similar conduct, patient vulnerability, failure to demonstrate competent nursing practice consistently during nursing career.		
Mitigating Circumstances for **§301.452(b)(13)**: Outcome not a result of care, participation in established or approved remediation or rehabilitation program and demonstrated competency, systems issues.		

Adopted October, 2009

Figure: 30 TAC §101.112(c)

$$Fee = \$5000 * \left(\frac{CPI}{122.15} \right) * \left(Actual - 0.8 * BaselineAmount \right)$$

Definitions:

Fee = The amount due amount due annually to the commission based on emissions of actual volatile organic compounds (VOC) or nitrogen oxides (NO_X).

CPI = The annual Consumer Price Index (CPI) adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with Federal Clean Air Act, §502(b)(3)(B)(v) and §185(b)(3).

Actual = All quantifiable emissions of VOC or NO_X reported in the annual emissions inventory including emissions from emissions events in units of tons.

Baseline Amount = Baseline amount for VOC or NO_X calculated per §101.103 of this title (relating to Baseline Amount Calculation).

Figure: 30 TAC §101.114(c)

$$AggregatedFee = \$5000\left(\frac{CPI}{122.15}\right) * \left[(VOCActual + NOxActual) - 0.8 * AggregatedBaseline\right]$$

Definitions:

Aggregated Fee = The total amount of fee due annually to the commission based on aggregation volatile organic compounds (VOC) and nitrogen oxides (NO_X) actual emissions.

CPI = The annual Consumer Price Index (CPI) adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with Federal Clean Air Act, §502(b)(3)(B)(v) and §185(b)(3).

VOC Actual = All quantifiable emissions of VOC reported in the annual emissions inventory including emissions from emissions events in units of tons.

NO_X Actual = All quantifiable emissions of NO_X reported in the annual emissions inventory including emissions from emissions events in units of tons.

Aggregated Baseline = Aggregated pollutant baseline amount for combined VOC and NO_X calculated per §101.104 of this title (relating to Aggregated Pollutant Baseline Amount). The equivalent obligation amount would be limited to VOC for VOC and NO_X for NO_X and not allow aggregation of these compounds when using the local cap and trade program.

Figure: 30 TAC §101.115(d)

$$AggregatedSiteFee = \$5000 * \left(\frac{CPI}{122.15}\right) * \left(AggregatedActual - 0.8 * AggregatedBaselineAmount\right)$$

Definitions:

Aggregated Site Fee = The amount due annually to the commission based on actual volatile organic compounds (VOC) or nitrogen oxides (NO_X) emissions if one or more sites emissions are aggregated.

Aggregated Fee = The amount due annually to the commission based on actual VOC or NO_X emissions if one or more sites emissions are aggregated.

CPI = The annual Consumer Price Index (CPI) adjustment factor which is equivalent to the cumulative increase in the CPI beginning with the 1989 change in the index up to and including the change in year prior to the year for which the fees are due. For any calendar year the CPI is the average of the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year or the revision of the CPI which is most consistent with the CPI for calendar year 1989 in accordance with Federal Clean Air Act, §502(b)(3)(B)(v) and §185(b)(3) (relating to Multiple Site Baseline Amount).

Aggregated Actual = All quantifiable emissions of VOC or NO_X reported in the annual emissions inventory including emissions from emissions events in units of tons for the regulated entities combined per §101.105 of this title.

Aggregated Baseline Amount = Baseline amount in units of tons combined from multiple sites and calculated per §101.105 of this title.

Figure: 30 TAC §290.47(j)

Appendix J: Emergency Preparedness Plan Template

This appendix contains information to assist an affected utility in preparing an emergency preparedness plan. A comprehensive guide and shell form, TCEQ Form No. 20536, for preparing a plan is available from the executive director upon request. A cover letter containing the name of the affected utility and, if applicable, public water system identification number (PWS ID), district number and water certificate of convenience and necessity (CCN) must be included with the plan submittal. Also, the letter must include the affected utility representative's name, title and contact telephone number.

Information provided by an affected utility relating to its emergency preparedness plan is confidential and is not subject to disclosure under Texas Government Code, Chapter 552.

Rules. All of 30 TAC Chapter 291, Subchapter L applies to affected utilities that are not public water systems. The following commission rules apply to affected utilities that are public water systems:

Definitions: §290.38(1), (26), and (28)

General Provisions: §290.39(c)(4)(A)-(E) and (o)(1)-(5)

Water Distribution: §290.44(d)

Minimum Water System Capacity Requirements: §290.45(a)(7), (b)(3), (c)(3), (d)(4), (e)(4), (g)(5)(A)(iv), (g)(5)(B), and (h).

Minimum Acceptable Operating Practices for Public Drinking Water Systems: §290.46(f)(5) and (r).

Appendix J: Emergency Preparedness Plan Template: §290.47(j)

Plan Options. A submitted emergency preparedness plan must include one of the following:

(1) Auxiliary generators equipped with automatic starting generators and switch over equipment. This equipment must have the ability to detect the failure of normal power from the electric grid; automatically start the generator; isolate necessary water equipment from the normal power grid; and switch the running generator's power to power the necessary water equipment to maintain the required minimum pressure.

(2) Two or more affected utilities may propose the sharing of auxiliary generator power. Necessary electrical and/or water connections equipped with automatic switch over and opening valves must be presented in the plan to demonstrate how one or more affected utilities will be able to maintain the required minimum pressure. Describe which equipment will share the auxiliary generator power and which equipment, if any, would receive power from only a single affected utility's auxiliary power equipment.

(3) Copies of negotiated leasing and contract agreements for emergency power equipment and any necessary fuel. This includes mutual aid agreements with other retail public utilities, exempt utilities, or providers or conveyors of potable or raw water service if the agreements provide for coordination with the division of emergency management in the governor's office. Consideration must be given to the location of where the other water supplier(s) are located as they may also be affected by the same natural disaster. In addition, when entering into a contract for leasing of emergency power equipment

and necessary fuel, the contractual commitments of the supplier to other water suppliers and businesses within an area subject to the same natural disaster event must be taken into consideration.

(4) Use of portable generators capable of serving multiple facilities. The portable generator(s) and the necessary water equipment must be pre-equipped with quick-connect, mating electrical connectors to facilitate the rapid implementation of the emergency preparedness plan. The plan must address whether there is an adequate number of portable generators to operate all of the necessary water equipment in order to maintain the required minimum pressure in multiple pressure plans or at multiple systems, if affected by the same natural disaster event.

(5) In lieu of generators, alternative on-site electrical generation, or distributed electrical generation facilities, may be used. This may include the use of wind, solar or other power as a means of providing sufficient emergency power to operate the necessary water equipment to maintain the required minimum pressure.

(6) Hardening of the electric transmission and distribution system serving the affected utility. One alternative is to relocate electric transmission lines for the system from overhead to underground and protect them from flooding. Another alternative is to replace overhead transmission lines, poles, and related appurtenances with ones that can withstand historical hurricane-force wind velocities, and trim or remove any trees next to and above the overhead transmission lines. Either alternative must include documentation on the ability of applicable power plant(s) and station(s) to withstand hurricane-force winds.

(7) Engines equipped with direct or right angle drives can be used as auxiliary power sources. Each pump or other equipment must be equipped with appropriate mechanical fittings to facilitate the use of engines. The plan must address the operation of chemical feed pumps using a generator(s).

(8) Any other alternative determined by the executive director to be acceptable.

Plan Contents. An emergency preparedness plan must provide for any applicable production, treatment, transfer and service pumps at an adequate flow rate and at a minimum pressure of 35 psi in the far reaches of an affected distribution system, including multiple pressure planes. If applicable, provide the following information:

- □ Contact information, including names, emergency telephone and pager numbers, and email addresses.
- □ List all ground, surface, and purchased water sources, with locations and individual capacities.
- □ List all interconnections with other water providers; whether normally open or closed; size; whether wholesale, purchase, or both; available capacity; and any other pertinent information. Include the names of each interconnection and their contact information, including names, titles, telephone and pager numbers, and email addresses.
- □ List the capacity and power requirements of all treatment equipment.
- □ For each chemical, list the type of storage, volume, and volume required per day during emergency operations.
- □ Provide a copy of all water distribution and transmission piping maps.
- □ Provide the maximum and average daily demands. If the emergency preparedness plan is for a proposed affected utility, the minimum specified capacities in §290.45 of this subchapter shall be used for the maximum daily demand.

- ☐ List all primary electrical power sources.
- ☐ List all equipment necessary to provide water to customers at the required minimum pressure and adequate flow rate, and the power requirements for each piece of equipment.
- ☐ List the size, location and fuel requirement in gallons per hour at the load necessary to maintain emergency operations for all on-site manual and automatic auxiliary power equipment, and provide information as to how the affected utility determined the necessary fuel quantity.
- ☐ Provide documentation as to how the affected utility will ensure that it maintains an adequate supply of fuel during emergency operations.
- ☐ List the size, location, fuel requirement in gallons per hour at the load necessary to maintain emergency operations, and the name of the system sharing the equipment for all shared auxiliary power equipment. Include the other system's contact persons with their emergency telephone and pager numbers and email addresses.
- ☐ Provide a copy of any leasing and contracting agreements, including mutual aid agreements with other retail public utilities, exempt utilities, or providers or conveyors of potable or raw water service, if the agreements provide for coordination with the division of emergency management in the governor's office. If leasing, include the vendor's name, location, and contact information.
- ☐ List all portable generators' power, phase, type of quick-connect, fuel type, and fuel demand in gallons per hour.
- ☐ Provide specifications, a description, and detailed capacity information for all on-site electrical generation or distributive generation equipment. Include all fuel demands for this equipment.
- ☐ List all direct or right angle drive emergency power equipment with the name, type of engine, fuel type, and fuel demand in gallons per hour.
- ☐ Provide details for any other proposed alternative.
- ☐ For each fuel tank, provide the location, volume, name of fuel suppliers, contact names, titles, telephone and pager numbers, and email addresses.
- ☐ List all local and state emergency responders and their emergency contact telephone and pager numbers. Include medical facilities.
- ☐ List all priority water users, such as hospitals and nursing homes, and their emergency contact names, titles, telephone and pager numbers, and email addresses.
- ☐ List any bulk water haulers that could be used, including contact names, telephone and pager numbers, and email addresses.
- ☐ Provide the system's designated media spokesperson with a list of local media contact names, titles, type of media, telephone and pager numbers, and email addresses.
- ☐ Provide the water restrictions that the system will implement during an emergency response.
- ☐ Provide a proposed time frame for full implementation of the emergency preparedness plan.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Texas Water Act Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code.

Case Title and Court: *Travis County, Texas and State of Texas*, Plaintiffs, *and Marvin Leon Myers, et al*, Plaintiffs-Intervenors, *v. Coldwater Development, Ltd., and Rodman Excavation, Inc., et al*, Defendants, Cause No. D-1-GV-07-002293, in the 98th Judicial District Court, Travis County, Texas.

Nature of Defendant's Operations: Defendant Coldwater is the owner and developer of a low density residential subdivision. Defendant Rodman is a construction contractor that worked at Coldwater's subdivision. The State alleges that Coldwater and Rodman caused, suffered, or allowed violations of the Texas Water Code by discharging sediment into Hamilton Creek.

Proposed Agreed Judgment: The Agreed Final Judgment orders Defendants to pay civil penalties, fund supplemental environmental projects, and pay attorney's fees to the State. Defendants have agreed to pay Plaintiff $300,000.00, in civil penalties, $300,000.00 of which will be used to fund TCEQ-approved Supplemental Environmental Project(s) and an additional $200,000.00 in attorney's fees.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Ryan P. Fite, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-200905399
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: November 23, 2009

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Texas Education Agency

Request for Applications Concerning Dropout Recovery Pilot Program, Cycle 3

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-10-106 from Texas independent school districts, open-enrollment charter schools, institutions of higher education, county departments of education, nonprofit organizations that have demonstrated the ability and capacity to provide educational programs to students in any grade from Kindergarten-Grade 12, and regional education service centers (ESCs). To be eligible for funding under the Dropout Recovery Pilot Program, Cycle 3, the applicant must provide evidence in the application that for at least three years prior to submission of the grant application it has been operating as one of the entities defined as being eligible for funding under this grant.

If an applicant is operating as an education program that issues high school diplomas, the applicant must either be chartered or accredited. If the applicant is chartered, the applicant must have received its charter from the State Board of Education, the local school district in which the applicant resides, or a home-rule district, in accordance with the Texas Education Code (TEC), §§12.011, 12.052, 12.101, and 12.152. If accredited, the applicant must have earned its accreditation by one of the following means: through TEA, in accordance with the TEC, §39.071, as amended and renumbered to §39.051 by House Bill 3, 81st Texas Legislature, 2009, and 19 TAC §97.1053; through an accrediting entity operating as a member of the Texas Private School Accreditation Commission; or through another accrediting entity approved by the commissioner of education. Additional eligibility criteria apply, as described in the RFA. Entities that received funding under the Dropout Recovery Pilot Program, Cycles 1 and 2, are not eligible to apply for Cycle 3 funding.

Description. The purposes of the Dropout Recovery Pilot Program, Cycle 3, are to (1) identify and recruit students who have already dropped out of Texas public secondary schools and who are not currently enrolled in a Texas public secondary school; and (2) provide those students with services designed to enable them to succeed through a high school diploma path to college or an alternative path to college, as defined in the RFA.

The goals of the Dropout Recovery Pilot Program, Cycle 3, are to (1) expand the state's capacity to provide dropout recovery resources to students who have dropped out of public middle and high school; (2) provide Texas students who have dropped out of public middle or high school with an opportunity to obtain a high school diploma or complete an alternative path to college; (3) develop a flexible mechanism to respond to the particular needs of students who have dropped out of public middle and high school to facilitate their ability to earn a high school diploma or earn a high school equivalency credential (GED) and become college ready; (4) increase the number of students who earn a high school diploma; and (5) increase the number of students who earn a GED and become college ready.

Dates of Project. The Dropout Recovery Pilot Program, Cycle 3, grant will be implemented during the 2009-2010 and 2010-2011 school years. Applicants should plan for a starting date of no earlier than June 1, 2010, and an ending date of no later than August 31, 2011.

Project Amount. Approximately $6 million is available for funding Dropout Recovery Pilot Program, Cycle 3, grants during the June 1,

2010, through August 31, 2011, project period. The number of grants to be awarded will depend on the number of applicants selected for funding and the number of students those applicants plan to serve. Grantees will be awarded a base amount of funding, not to exceed $150,000, during the grant period based on the number of participants they plan to serve. This project is funded 100 percent with state funds.

Applicants' Conference. An applicants' conference will be held on Thursday, December 17, 2009, from 10:00 a.m. to 12:00 p.m. on the Texas Educational Telecommunication Network (TETN) available at each regional ESC (TETN Event #6945). To locate the nearest TETN facility, applicants should contact the TETN site manager at their regional ESC. A complete list of ESCs, including contact information, is available on the TEA website at http://www.tea.state.tx.us/ESC/.

Questions relevant to the RFA may be sent to Angela de Leon at Angela.DeLeon@tea.state.tx.us or faxed to (512) 463-4246 prior to Tuesday, December 15, 2009. These questions, along with other information, will be addressed in the presentation. The conference will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

The entire applicants' conference will be digitally recorded. Prospective applicants who are not able to attend the applicants' conference may request a password and procedures to download the video stream from the TETN site manager at their local ESC.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, February 4, 2010, to be eligible to be considered for funding.

TRD-200905406
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: November 23, 2009

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Request for Applications Concerning High Schools That Work (HSTW) Enhanced Design Network, Cycle 4

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Application (RFA) #701-10-103 from Texas independent school districts (ISDs) and open-enrollment charter schools on behalf of high school campuses serving students in at least three of Grades 9-12. In order to be eligible for High Schools That Work (HSTW) Enhanced Design Network, Cycle 4, funding, either the ISD or open-enrollment charter school or the high school campus must meet one of the following criteria: (1) the ISD or open-enrollment charter school must be at a Stage 3 or 4 intervention level for Career and Technical Education under the TEA Performance-Based Monitoring Analysis System; (2) the high school campus was rated *Academically Unacceptable* in 2009 under the state accountability rating system; or (3) at least 55 percent of students enrolled at the high school campus were identified as economically disadvantaged in each of the past three school years (i.e., 2006-2007, 2007-2008, and 2008-2009) and at least 45 percent of students were identified as being at risk of dropping out of school in the 2008-2009 school year. Other eligibility requirements apply, as defined in the RFA.

A campus is ineligible for HSTW Enhanced Design Network, Cycle 4, grant funding if the campus is identified as a disciplinary alternative education program or a juvenile justice alternative education program or if the campus operates under the alternative education accountability system. ISDs and open-enrollment charter schools are ineligible to apply on behalf of a high school campus if the ISD or open-enrollment charter school received funding under any of the following grant programs during the 2008-2009 or 2009-2010 school year: HSTW Enhanced Design Network, Cycle 1 or Cycle 2 Continuation; HSTW Enhanced Design Network, Cycle 3; Texas High School Redesign and Restructuring (whether funded from TEA, the Communities Foundation of Texas, or the Bill and Melinda Gates Foundation); Early College High School; Texas Science, Technology, Engineering and Mathematics (T-STEM) Academy; or T-STEM Special Project.

Description. The purpose of the HSTW Enhanced Design Network, Cycle 4, grant is to support high schools in implementing the HSTW redesign model in partnership with the TEA, the Southern Regional Education Board (SREB), and the Region 13 Education Service Center (ESC). Among the goals of the HSTW Enhanced Design Network, Cycle 4, grant are the following: expand students' opportunities to complete a rigorous academic core and either an academic, a career/technical, or a blended program of study; create supportive relationships between students and adults; create opportunities for teachers to serve as advisors with parents and students; focus school leadership on supporting what and how teachers teach by providing common planning time and professional development aligned with school improvement plans; have all high school students complete a challenging curriculum that focuses on preparing them for further education and the workplace; and enable students to earn, upon leaving high school, postsecondary credit or meet standards for postsecondary studies to avoid remedial courses. As described in the RFA, grantees will be expected to implement defined key practices to enable them to meet those goals and achieve the program purpose. The HSTW Enhanced Design Network, Cycle 4, grantees are required to support and budget for an SREB school im-

provement consultant to assist with the implementation of the HSTW design principles.

Dates of Project. The HSTW Enhanced Design Network, Cycle 4, grant will be implemented during the 2009-2010, 2010-2011, and 2011-2012 school years. Applicants should plan for a starting date of no earlier than May 1, 2010, and an ending date of no later than April 30, 2012.

Project Amount. Funding will be provided for approximately 10 projects. Each project will receive a maximum of $83,500 for the May 1, 2010, to April 30, 2012, project period. This project is funded 100 percent with state funds.

Applicants' Conference. An applicants' conference will be held on Wednesday, December 16, 2009, from 1:00 p.m. to 2:30 p.m. on the Texas Educational Telecommunication Network (TETN) available at each regional ESC (TETN Event #6733). To locate the nearest TETN facility, applicants should contact the TETN site manager at their regional ESC. A complete list of ESCs, including contact information, is available on the TEA website at http://www.tea.state.tx.us/ESC/.

Questions relevant to the RFA may be emailed to Dale Fowler at Dale.Fowler@tea.state.tx.us prior to Monday, December 14, 2009. These questions, along with other information, will be addressed in the presentation. The conference will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

The entire applicants' conference will be digitally recorded. Prospective applicants who are not able to attend the applicants' conference may request a password and procedures to download the video stream from the TETN site manager at their local ESC.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, January 28, 2010, to be eligible to be considered for funding.

TRD-200905407
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: November 23, 2009

Request for Applications Concerning Open-Enrollement Charter Guidelines and Application

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-09-120 from eligible entities to operate open-enrollment charter schools. Eligible entities include public institutions of higher education, private or independent institutions of higher education, organizations exempt from taxation under the Internal Revenue Code of 1986 (26 United States Code, §501(c)(3)), or governmental entities. At least one member of the governing board of the group requesting the charter must attend one required applicant conference. Conferences are scheduled for Wednesday, December 16, 2009, and Friday, January 22, 2010, in Room 1-111, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701-1494. Failure to attend one of the conferences will disqualify an applicant from submitting an application for an open-enrollment charter.

Description. The purpose of an open-enrollment charter is to provide an alternative avenue for restructuring schools. An open-enrollment charter school offers flexibility and choice for educators, parents, and students. An approved open-enrollment charter school may be located in a facility of a commercial or nonprofit entity or in a school district facility. If the open-enrollment charter school is to be located in a school district facility, it must be operated under the terms established by the board of trustees or governing body of the school district in an agreement governing the relationship between the charter school and the district.

An open-enrollment charter school will provide instruction to students at one or more elementary or secondary grade levels as provided by the charter. An open-enrollment charter school must be non-sectarian in its programs, admissions, policies, employment practices, and all other operations, and may not be affiliated with a sectarian school or religious institution. It is governed under the specifications of the charter and retains authority to operate for the term of the charter contingent on satisfactory student performance as defined by the state accountability system. An open-enrollment charter school does not have the authority to impose taxes.

An open-enrollment charter school is subject to federal laws and certain state laws governing public schools, including laws and rules relating to a criminal offense, requirements relating to the Public Education Information Management System, criminal history records, high school graduation, special education programs, bilingual education, prekindergarten programs, extracurricular activities, health and safety provisions, and public school accountability. As stated in the Texas Education Code (TEC), §12.156, in matters related to operation of an open-enrollment charter school, an open-enrollment charter school is immune from liability to the same extent as a school district, and its employees and volunteers are immune from liability to the same extent as school district employees and volunteers. A member of the governing body of an open-enrollment charter school or of a charter holder

is immune from liability to the same extent as a school district trustee. An employee of an open-enrollment charter school who qualifies for membership in the Teacher Retirement System of Texas shall be covered under the system to the same extent a qualified employee of a school district is covered.

Dates of Project. The completed application must be received by the TEA Document Control Center, Room 6-108, 1701 North Congress Avenue, Austin, Texas 78701-1494, on or before 5:00 p.m. (Central Time), Thursday, February 25, 2010, to be eligible for review.

Project Amount. The TEC, §12.106(a), states that a charter holder is entitled to receive funding for the open-enrollment charter school under the TEC, Chapter 42, as if the school were a school district without a tier one local share for purposes of the TEC, §42.253, and without any local revenue for purposes of the TEC, §42.302. In determining funding for an open-enrollment charter school, adjustments under the TEC, §§42.102-42.105, and the district enrichment tax rate under the TEC, §42.302, are based on the average adjustment and average district enrichment tax rate for the state. The TEC, §12.106(b), states that an open-enrollment charter school is entitled to funds that are available to school districts from the TEA or the commissioner of education in the form of grants or other discretionary funding unless the statute authorizing the funding explicitly provides that open-enrollment charter schools are not entitled to the funding. An open-enrollment charter school may not charge tuition and must admit students based on a lottery if more students apply for admission than can be accommodated. An open-enrollment charter school must prohibit discrimination in admission policy on the basis of sex; national origin; ethnicity; religion; disability; academic, artistic, or athletic ability; or the district the child would otherwise attend. However, a charter school that specializes in the performing arts may require a student to demonstrate artistic ability and may require an applicant to audition. The charter may provide for the exclusion of a student who has a documented history of a criminal offense, juvenile court adjudication, or a discipline problem under the TEC, Chapter 37, Subchapter A.

Selection Criteria. A complete description of selection criteria is included in the RFA.

The State Board of Education (SBOE) may approve open-enrollment charter schools as provided in the TEC, §12.101 and §12.152. There are currently 213 charters approved under the TEC, §12.101, and three charters approved under the TEC, §12.152. There is a cap of 215 charters approved under the TEC, §12.101, and no cap on the number of charters approved under the TEC, §12.152.

The SBOE may approve applicants to ensure representation of urban, suburban, and rural communities; various instructional settings; innovative programs; diverse student populations and geographic regions; and various eligible entities. The SBOE will consider Statements of Impact from any school district whose enrollment is likely to be affected by the open-enrollment charter school. The SBOE may also consider the history of the sponsoring entity and the credentials and background of its board members.

Requesting the Application. An application must be submitted under SBOE guidelines to be considered. A complete copy of the publication *Open-Enrollment Charter Guidelines and Application* (RFA #701-09-120), which includes an application and procedures, may be obtained on the TEA website at http://www.tea.state.tx.us/index.aspx?id=3475.

Further Information. For clarifying information about the open-enrollment charter school application, contact Mary Perry, Division of Charter School Administration, Texas Education Agency, at (512) 463-9575 or mary.perry@tea.state.tx.us.

TRD-200905408

Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: November 23, 2009

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 4, 2010.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Bobby G. Addington; DOCKET NUMBER: 2009-1823-WOC-E; IDENTIFIER: RN105734057; LOCATION: Blue Ridge, Collin County; TYPE OF FACILITY: licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Clearstream Wastewater Systems, Incorporated; DOCKET NUMBER: 2009-1420-AIR-E; IDENTIFIER: RN100214659; LOCATION: Silsbee, Hardin County; TYPE OF FACILITY: fiberglass manufacturing plant; RULE VIOLATED: 30 TAC §§122.143(4), 122.145(2)(B) and (C), and 122.146(1) and (2), Air Permit Number O-01796, General Terms and Conditions (GTC), Air Permit Number 26245, General Condition (GC) Number 10, and THSC, §382.085(b), by failing to submit a deviation report; and 30 TAC §113.1060 and §122.143(4), Air Permit Number O-01796, GTC, Air Permit Number 26245, GC Number 10, 40 Code of Federal Regulations (CFR) §63.5910(a) and (b)(4), and THSC, §382.085(b), by failing to submit a semiannual compliance report; PENALTY: $7,125; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Comal Independent School District; DOCKET NUMBER: 2009-1536-EAQ-E; IDENTIFIER: RN104421649; LOCATION: Fischer, Comal County; TYPE OF FACILITY: construction site for a high school; RULE VIOLATED: 30 TAC §213.23(a)(1) and Contributing Zone Plan (CZP) Number 13-04101101, Standard Conditions Number 3, by failing to obtain an approval of a modification to the CZP prior to conducting a regulated activity over the Edwards Aquifer Contributing Zone; 30 TAC §213.23(j) and CZP Number 13-04101101, Permanent Pollution Abatement Measures Number 5, by failing to construct the on site extended detention basin in accordance with the design proposed in the CZP; and 30 TAC §213.23(j) and CZP Number 13-04101101, Standard Conditions Number 9, by failing to provide soil stabilization measures at the site; PENALTY: $4,700; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Draper Construction & Land Development, LLC; DOCKET NUMBER: 2009-1241-WQ-E; IDENTIFIER: RN105324099; LOCATION: Harrison County; TYPE OF FACILITY: residential construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR15LD14, Part III, Section F.2(a) and F.6., and the Code, §26.121(a), by failing to properly design and maintain sediment controls to retain sediment on-site and prevent the discharge of sediment to any water in the state; PENALTY: $7,770; Supplemental Environmental Project (SEP) offset amount of $8,025 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(5) COMPANY: Enbridge Pipelines (East Texas), L.P.; DOCKET NUMBER: 2009-1153-AIR-E; IDENTIFIER: RN102735800; LOCATION: Eustace, Marion County; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §122.146(2), General Operating Permit Number 02559, Site-Wide Requirements (b)(2), and THSC, §382.085(b), by failing to submit the final Title V compliance certification; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(6) COMPANY: Curtis Evans; DOCKET NUMBER: 2009-1178-MLM-E; IDENTIFIER: RN103000006; LOCATION: Fort Davis, Jeff Davis County; TYPE OF FACILITY: ranch; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized discharge of municipal solid waste (MSW); and 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning; PENALTY: $6,377; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(7) COMPANY: Explorer Pipeline Company; DOCKET NUMBER: 2009-1434-AIR-E; IDENTIFIER: RN100225739; LOCATION: Euless, Tarrant County; TYPE OF FACILITY: pipeline breakout and pumping station; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1) and (2), Federal Operating Permit (FOP) Number O-02891, GTC, and THSC, §382.085(b), by failing to submit an annual compliance certification (ACC) report; PENALTY: $3,475; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2009-1080-AIR-E; IDENTIFIER: RN102579307; LOCATION: Baytown, Harris County; TYPE OF FACILITY: refining and supply company; RULE VIOLATED: 30 TAC §116.715(a), Flexible Permit Number 18287, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §§101.4, 112.31, and 116.715(a), Flexible Permit Number 18287, SC Number 1, and THSC, §382.085(a) and (b), by failing to prevent unauthorized emissions and nuisance conditions; PENALTY: $40,000; SEP offset amount of $20,000 applied to Barbers Hill Independent School District - Alternative Fueled Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: Fort Gates Water Supply Corporation; DOCKET NUMBER: 2009-1260-PWS-E; IDENTIFIER: RN101216257; LOCATION: Coryell County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(v) and THSC, §341.0315(c), by failing to provide emergency power that will deliver water at a rate of 0.35 gallons per minute per connection; PENALTY: $750; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7626, (254) 751-0335.

(10) COMPANY: FOX TREE & LANDSCAPING NURSERY, INC. dba Mother Earth Landscape Materials; DOCKET NUMBER: 2009-1426-MSW-E; IDENTIFIER: RN104751177; LOCATION: Robstown, Nueces County; TYPE OF FACILITY: composting, brush recycling, concrete recycling, and sand and select fill mining operation; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; and 30 TAC §328.5(f), by failing to maintain the required waste minimization and recycling records; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: City of Freeport; DOCKET NUMBER: 2009-1109-PST-E; IDENTIFIER: RN102027752; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip the tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches a preset level no higher than 95% capacity level for the tank; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(3)(G) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS) in proper operating condition and free of defects; 30 TAC §334.50(d)(9)(A)(iv) and §334.72, by failing to report a suspected release to the agency within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release of regulated substances within 30 days of discovery; PENALTY: $12,375; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: City of Hawk Cove; DOCKET NUMBER: 2009-1193-MWD-E; IDENTIFIER: RN104265848; LOCATION: Hunt County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(5) and TPDES Permit Number WQ0014522001, Operational Requirements Number 4, by failing to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated waste during electrical power failures;

PENALTY: $3,575; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Helena Chemical Company; DOCKET NUMBER: 2009-1433-AIR-E; IDENTIFIER: RN102006871; LOCATION: Bardwell, Ellis County; TYPE OF FACILITY: fertilizer blending and seed treating plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518 and §382.085(b), by failing to obtain authorization to construct and operate a fertilizer blending and seed treating plant; PENALTY: $2,000; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: International A.L.E.R.T. Academy; DOCKET NUMBER: 2009-1028-PWS-E; IDENTIFIER: RN101193167; LOCATION: Upshur County; TYPE OF FACILITY: surface water treatment plant; RULE VIOLATED: 30 TAC §290.42(f)(1)(E)(ii)(I), by failing to provide containment facilities for a single container or for multiple interconnected containers large enough to hold the maximum amount of chemical that can be stored with a minimum freeboard of six vertical inches or to hold 110% of the total volume of the container(s), whichever is less; 30 TAC §290.43(c)(8), by failing to maintain the facility's storage tanks so that they are painted, covered, and disinfected in accordance with American Water Works Association (AWWA) standards; 30 TAC §290.111(e)(1)(A) and (B) and (i)(3) and THSC, §341.0315(c), by failing to achieve the turbidity levels of combined filter effluent that is less than one nephelometric turbidity unit (NTU) and less than 0.3 NTU in at least 95% of samples tested each month, and less than five NTU in combined filter effluent; 30 TAC §290.111(h)(2) and (11), by failing to timely submit a surface water monthly operating report for the month of November 2007; 30 TAC §290.111(i)(7), by failing to correct the performance-limiting factors identified in the July 2008 mandatory comprehensive performance evaluation corrective action plan; 30 TAC §290.46(m)(4), by failing to maintain all treatment units, storage, and pressure maintenance facilities, distribution system lines, and related appurtenances in a watertight condition; and 30 TAC §290.111(e)(5)(C), by failing to monitor continuous turbidity; PENALTY: $9,062; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3437, (903) 535-5100.

(15) COMPANY: City of La Grange; DOCKET NUMBER: 2009-0951-MWD-E; IDENTIFIER: RN100626001; LOCATION: La Grange, Fayette County; TYPE OF FACILITY: domestic wastewater treatment; RULE VIOLATED: 30 TAC §305.125(4), TPDES Permit Number WQ0010019001, Permit Conditions Number 2.d, and the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of sludge in the receiving stream; and 30 TAC §305.125(9) and TPDES Permit Number WQ0010019001, Monitoring and Reporting Requirements Number 7.a, by failing to notify the TCEQ of an unauthorized discharge orally within 24 hours of becoming aware of the noncompliance and to provide a complete written report of the noncompliance; PENALTY: $4,100; SEP offset amount of $3,280 applied to Lower Colorado River Authority's Household Hazardous Waste and Reusable Materials Collection; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(16) COMPANY: City of Madisonville; DOCKET NUMBER: 2009-1248-MWD-E; IDENTIFIER: RN101719821; LOCATION: Madison County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1) and (5) and TPDES Permit Number WQ0010215001, Operational Requirements Number 4, by failing to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures; PENALTY: $4,425; SEP offset amount of $3,540 applied to RC&D - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(17) COMPANY: Marathon Petroleum Company, LLC; DOCKET NUMBER: 2008-1709-AIR-E; IDENTIFIER: RN100210608; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §§101.20(1) and (2), 115.352(4), 116.715(a), and 122.143(4), 40 CFR §60.482-6(a)(1) and §63.167(a)(1), NSR Permit Number 22433, SC Number 10.E., FOP Number O-01380, Special Terms and Conditions (STC) Numbers 1.A. and 21, and THSC, §382.085(b), by failing to seal open-ended valves with a cap, blind flange, plug, or second valve; 30 TAC §115.114(a)(4) and §122.143(4), FOP Number O-01380, STC Number 1.A., and THSC, §382.085(b), by failing to repair or empty and degass external floating roof tank number 111 within 60 days of the discovery of pinhole leaks on the roof deck; 30 TAC §115.546(2)(C) and §122.143(4), FOP Number O-01380, STC Number 8.A.(vi), and THSC, §382.085(b), by failing to maintain records of monitoring for carbon canister breakthrough; 30 TAC §§101.20(2), 115.112(a)(2)(B), and 122.143(4), 40 CFR §63.119(b)(4) and §63.646(a), FOP Number O-01372, STC Number 1.A., and THSC, §382.085(b), by failing to maintain vacuum breakers in a closed position during normal operation; 30 TAC §101.20(2) and §122.143(4), 40 CFR §63.120(b)(8) and §63.646(a), FOP Number O-01380, STC Number 1.A., and THSC, §382.085(b), by failing to repair the tank floating roof primary seal, empty the tank, or request an extension for seal repair within 45 days of determining that the seal needed replacement; 30 TAC §122.143(4) and §106.263(g), FOP Number O-01380, STC Number 21, and THSC, §382.085(b), by failing to maintain records to demonstrate compliance with the emission limits in 30 TAC §106.4(a)(1) - (3) and §106.263; 30 TAC §101.20(2) and §122.143(4), 40 CFR §61.356(f)(2)(i)(G), FOP Number O-01380, STC Number 1.A., and THSC, §382.085(b), by failing to maintain records of design analysis for carbon canisters; 30 TAC §101.20(2) and §122.143(4), 40 CFR §61.12(c), FOP Number O-01380, STC Number 12.E., and THSC, §382.085(b), by failing to maintain and operate lift station 26b carbon canisters in a manner consistent with good air pollution control practices for minimizing emissions; 30 TAC §101.20(2) and §122.143(4), 40 CFR §61.354(d), FOP Number O-01380, STC Number 1.A., and THSC, §382.085(b), by failing to properly conduct monitoring of carbon canisters; 30 TAC §101.20(2) and §122.143(4), 40 CFR §61.354(b)(2), FOP Number O-01380, STC Number 1.A., and THSC, §382.085(b), by failing to monitor the waste streams entering the enhanced biodegradation unit monthly as required; and 30 TAC §101.20(2) and §122.143(4), 40 CFR §61.342(f)(2), FOP Number O-01380, STC Number 1.A., and THSC, §382.085(b), by failing to provide proper notification with each shipment of waste for offsite treatment; PENALTY: $115,347; SEP offset amount of $92,278 applied to operating and maintaining the existing off-site ambient air benzene and meteorological monitoring station from January 2, 2010 through December 31, 2010; and shall upload the resulting data to the TCEQ Leading Environmental Analysis and Display System data system; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: Daniel R. Mullen dba McMahan General Store; DOCKET NUMBER: 2009-0762-PST-E; IDENTIFIER: RN101497097; LOCATION: Dale, Caldwell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to

ensure that all spill and overfill prevention devices are maintained in good operating condition; 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip the tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches a preset level no higher than 95% capacity level for the tank; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection for the piping associated with the UST system; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; and 30 TAC §334.49(e), by failing to maintain UST records and make them immediately available for inspection upon request; PENALTY: $7,210; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(19) COMPANY: City of Mullin; DOCKET NUMBER: 2008-1820-MWD-E; IDENTIFIER: RN102186756; LOCATION: Mullin, Mills County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013758001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total suspended solids (TSS) and five-day biochemical oxygen demand (BOD_5); 30 TAC §305.125(17) and TPDES Permit Number WQ0013758001, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(17) and TPDES Permit Number WQ0013758001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $13,000; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: North Texas District Council Assemblies of God; DOCKET NUMBER: 2009-0998-MWD-E; IDENTIFIER: RN101513554; LOCATION: Ellis County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(17) and TPDES Permit Number WQ0013847001, Monitoring and Reporting Requirements Number 1, by failing to submit discharge monitoring reports (DMRs); and 30 TAC §305.125(17) and TPDES Permit Number WQ0013847001, Monitoring and Reporting Requirements Number 1, by failing to submit DMR parameter data; 30 §305.125(17) and TPDES Permit Number WQ0013847001, by failing to submit the annual sludge report; 30 TAC §305.125(1) and TPDES Permit Number WQ0013847001, Operational Requirements Number 5, by failing to properly measure flow; 30 TAC §305.125(1) and §319.11(c) and TPDES Permit Number WQ0013847001, Monitoring and Reporting Requirements Number 2, by failing to properly conduct the total chlorine residual analysis; 30 TAC §305.125(1) and TPDES Permit Number WQ0013847001, Monitoring and Reporting Requirements Number 7.c, by failing to notify the TCEQ in writing of any effluent permit excursion of 40% or greater; 30 TAC §305.125 and TPDES Permit Number WQ0013847001, Monitoring and Reporting Requirements Number 3.b and Operational Requirements Number 1, by failing to maintain operations and maintenance and sampling records; and 30 TAC §305.125(7) and §305.126(b) and TPDES Permit Number WQ0013847001, Permit Conditions Numbers 2.c, 4.a.i, and 4.a.ii and Operational Requirements Number 3.a, by failing to obtain permit authorization before using and discharging from a second package plant; PENALTY: $21,423; SEP offset amount of $17,139 applied to RC&D - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: One Tri-State Enterprises, L.L.C. dba J & B Food Mart; DOCKET NUMBER: 2009-1286-PST-E; IDENTIFIER: RN102357183; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of Stage II equipment; and 30 TAC §115.246(6) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review upon request; PENALTY: $5,996; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: Jason B. Orlando; DOCKET NUMBER: 2009-0985-LII-E; IDENTIFIER: RN104374699; LOCATION: Temple, Bell County; TYPE OF FACILITY: landscaping business; RULE VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2), Texas Occupations Code, §1903.251, and the Code, §37.003, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $188; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(23) COMPANY: OXFORD CONVENIENCE, INC. dba Oxford Convenience Store; DOCKET NUMBER: 2009-1272-PST-E; IDENTIFIER: RN101553634; LOCATION: Lewisville, Denton County; TYPE OF FACILITY: convenience store with retails sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS; PENALTY: $2,724; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Real Holdings Group, LLC; DOCKET NUMBER: 2009-1520-MWD-E; IDENTIFIER: RN103124202; LOCATION: Lee County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012368001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted limits for BOD_5 and TSS; and 30 TAC §305.125(17) and TPDES Permit Number WQ0012368001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $9,250; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(25) COMPANY: Dwayne Stailey; DOCKET NUMBER: 2009-1822-WOC-E; IDENTIFIER: RN103406575; LOCATION: Blue Ridge, Collin County; TYPE OF FACILITY: licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: Texas H2O, Inc.; DOCKET NUMBER: 2009-0982-MWD-E; IDENTIFIER: RN101702397; LOCATION: Hood County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013786001, Interim Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for TSS, total chlorine residual, and BOD_5; PENALTY: $9,280; SEP offset amount of $3,712 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Pamela

Campbell, (512) 239-4493; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: Texas Landing Utilities, L.C.; DOCKET NUMBER: 2009-1556-PWS-E; IDENTIFIER: RN101210037; LOCATION: Polk County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection; 30 TAC §290.43(c)(3), by failing to provide an overflow that shall be sized to handle the maximum possible fill rate without exceeding the capacity overflow for the facility's ground storage tank; and 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meters at least once every three years; PENALTY: $273; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(28) COMPANY: The Shredder Company, LLC; DOCKET NUMBER: 2009-1839-WQ-E; IDENTIFIER: RN101241180; LOCATION: El Paso County; TYPE OF FACILITY: machine tools; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(29) COMPANY: Trinity Tank Car, Inc.; DOCKET NUMBER: 2009-1513-AIR-E; IDENTIFIER: RN100225804; LOCATION: Saginaw, Tarrant County; TYPE OF FACILITY: railroad tank car manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), FOP Number O-01658, GTC, and THSC, §382.085(b), by failing to submit an ACC; PENALTY: $1,875; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(30) COMPANY: W & J Investment, Inc. dba Gas N Stuff; DOCKET NUMBER: 2009-1195-PST-E; IDENTIFIER: RN101280097; LOCATION: Tomball, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment, vapor space manifolding, and dynamic back pressure; PENALTY: $3,071; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-200905411
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 23, 2009

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Notice of Comment Period and Hearing on Draft Municipal Solid Waste Landfill General Operating Permit

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and a notice and comment hearing (hearing) on the draft revisions to Municipal Solid Waste Landfill General Operating Permit (GOP) Number 517. The draft GOP contains revisions to codified applicable requirements including: the addition of codified federal requirements for spark and compression ignited internal combustion engines and stationary gas turbines; addition of affected counties in the Dallas/Fort Worth ozone nonattainment area; updating applicable requirements for air curtain incinerators; and the re-codification of rule citations of 30 Texas Administrative Code Chapter 117, Control of Air Pollution from Nitrogen Compounds.

The draft GOP is subject to a 30-day comment period. During the comment period, any person may submit written comments on the draft GOP. A hearing will be held in Austin on December 7, 2009 at 1:30 p.m. in Room 201A of TCEQ, Building B, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TCEQ staff member will be available to discuss the draft GOP 30 minutes prior to the hearing and will also be available to answer questions after the hearing.

Copies of the draft GOP may be obtained from the TCEQ Web site at *http://www.tceq.state.tx.us/permitting/air/nav/air_genoppermits.html* or by contacting the TCEQ Office of Permitting and Registration, Air Permits Division at (512) 239-1250. Written comments may be mailed to Beecher Cameron, Texas Commission on Environmental Quality, Office of Permitting and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments should reference the draft Municipal Solid Waste Landfill GOP. Comments must be received by 5:00 p.m. on December 22, 2009. For further information, contact Mr. Cameron at (512) 239-1495.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the TCEQ at (512) 239-4000. Requests should be made as far in advance as possible.

TRD-200905326
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 19, 2009

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Notice of Completion of Technical Review on Proposed Radioactive Material License Number R06062

APPLICATION. South Texas Mining Venture, L.L.P. (STMV), 500 North Shoreline Blvd., Suite 800N, Corpus Christi, Texas 78471 has applied to the Texas Commission on Environmental Quality (TCEQ) for a radioactive material license to authorize in situ leach extraction and recovery of uranium, concurrent production of by-product material, and disposal of fluid by-product material by deep well injection. STMV desires to engage in the production of uranium at sites in Texas by in situ leach mining and processing of the extracted uranium to a yellowcake product. The proposed facility is located approximately six (6) miles North of Benavides, Texas on Ranch Road 3196 in Duval County, Texas. The application was submitted to the (Texas) Department of State Health Services on February 28, 2007, and subsequently transferred to the TCEQ on July 1, 2007.

The TCEQ Executive Director has completed the technical review of the application and prepared a draft license and a draft environmental analysis. The draft license if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this license, if issued, meets all statutory and regulatory requirements. The license application, Executive Director's technical summary, environmental analysis, and draft license are available for viewing and copying at the TCEQ's central office in Austin, Texas and at Duval County Courthouse, District Clerk's Office, 400 East Gravis Street, San Diego, Texas.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit com-

ments or to ask questions about the application. The TCEQ holds a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments.

OPPORTUNITY FOR A CONTESTED CASE HEARING. A contested case hearing is a legal proceeding similar to a civil trial in a state district court. The TCEQ may grant a contested case hearing on this application if a written hearing request is timely submitted.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and license number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement '[I/we] request a contested case hearing.' If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

EXECUTIVE DIRECTOR ACTION. The Executive Director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the Executive Director will not issue final approval of the permit and will forward the application and request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and license number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html within 30 days from the date of newspaper publication of this notice.

AGENCY CONTACTS AND INFORMATION. If you need more information about this license application or the licensing process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Further information may also be obtained from STMV at the address stated above or by calling Larry McGonagle at (361) 888-8235 ext 224.

TRD-200905445

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 23, 2009

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 4, 2010**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2010**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Alcoa Inc.; DOCKET NUMBER: 2008-1425-AIR-E; TCEQ ID NUMBER: RN100221472; LOCATION: 4069 Charles Martin Hall Road, Rockdale, Milam County; TYPE OF FACILITY: primary aluminum smelting plant; RULES VIOLATED: 30 TAC §§101.20(2), 116.115(c), and 122.143(4), 40 Code of Federal Regulations (CFR) §63.1506(n)(1), Texas Health and Safety Code (THSC), §382.085(b), New Source Review Permit (NSRP) Number 56300, Special Conditions (SC) Number 4, and Federal Operating Permit (FOP) Number O-2050, Special Terms and Conditions (STC) Number 1.D, by failing to comply with the total chlorine flux rate on February 1, 2007; 30 TAC §§101.20(2), 116.115(c), and 122.143(4), 40 CFR §63.1505(k)(1), THSC, §382.085(b), NSRP Number 56300, SC Number 4, and FOP Number 0-2050, STC Number 1.D, by failing to comply with particulate matter (PM) emission rates on November 13 and 14, 2007; 30 TAC §§101.20(2), 116.115(b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), NSRP Number 56300, SC Number 1, and FOP Number O-2050, STC Number 6, by failing to comply with the maximum allowable emission rate (MAER) for hydrogen fluoride (HF) for Potline 4 roof monitors; 30 TAC §§101.20(2), 116.115(b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), NSRP Number 56300, SC Number 1, and FOP Number O-2050, STC Number 6, by failing to comply with the MAER for Potline 7 roof monitors; 30 TAC §116.115(b)(2)(F) and (c), and §122.143(4), NSRP

Number 56300, SC Number 1, FOP Number O-2050, STC 6, and THSC, §382.085(b), by failing to comply with the MAER for HF and particulate fluoride (PF) for the Potline 4 room monitors; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), NSRP Number 56300, SC Number 1, FOP Number O-2050, STC 6, and THSC, §382.085(b), by failing to comply with the MAER for PF for the Potline 5 roof monitors emission point numbers (EPNs) F10E-1, F10E-2, F10E-3, F10E-4; and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-2050, General Terms and Conditions, and THSC, §382.085(b), by failing to report all instances of deviation within 30 days after the end of each reporting period; PENALTY: $9,827; STAFF ATTORNEY: Anna Treadwell, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Central Transport, Inc.; DOCKET NUMBER: 2009-0638-PST-E; TCEQ ID NUMBER: RN102446523; LOCATION: 7179 Industrial Avenue, El Paso County; TYPE OF FACILITY: vehicle refueling station; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.8(c)(5)(B)(ii), by failing to timely renew a previously issued TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date allowing the delivery certificate to expire on August 31, 2008; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $2,650; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(3) COMPANY: Charles and Nancy Knight; DOCKET NUMBER: 2008-1495-EAQ-E; TCEQ ID NUMBER: RN105532782 and RN104671565; LOCATION: 1725 County Road (CR) 239, Georgetown, Williamson County and 1153 CR 239, Florence, Williamson County; TYPE OF FACILITY: rock quarry activity; RULES VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a Water Pollution Abatement Plan (WPAP) prior to initiating construction activity; and 30 TAC §213.4(a)(1) and §213.5(a)(4), by failing to obtain approval of an aboveground storage tank facility plan prior to beginning a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $11,000; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: Oneok Hydrocarbon Southwest, L.L.C.; DOCKET NUMBER: 2009-0400-AIR-E; TCEQ ID NUMBER: RN100209949; LOCATION: 9900 Farm-to-Market Road 1942, Mont Belvieu, Chambers County; TYPE OF FACILITY: natural gas liquids fractionation; RULES VIOLATED: 30 TAC §116.115(c), NSRP Number 3956B, SC 1 and THSC, §382.085(b), by failing to prevent unauthorized emissions that were determined to be excessive; PENALTY: $160,000; Supplemental Environmental Projects (SEP) offset amount of $80,000 applied to Barbers Hill Independent School District Barbers Hill Energy Efficiency Program; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: Ralph Thomas and Janice Thomas; DOCKET NUMBER: 2008-1613-PST-E; TCEQ ID NUMBER: RN100899343; LOCATION: 1800 Houston Avenue, Houston, Harris County; TYPE OF FACILITY: property with an inactive UST; RULES VIOLATED: 30 TAC §334.47(a)(2) and § 334.54(b) and (d)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements, failing to maintain all piping, pump, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; and failing to ensure that any residue from stored regulated substances which remained in the temporarily out-of-service UST system did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the UST system within 30 days of the occurrence of the change or addition; PENALTY: $6,300; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Rapid Marine Fuels, L.L.C. dba Rapid Environmental Services, L.L.C.; DOCKET NUMBER: 2007-1894-MLM-E; TCEQ ID NUMBER: RN100669217; LOCATION: 4700 Duranzo Avenue, El Paso, El Paso County; TYPE OF FACILITY: used oil filter storage facility, used oil transfer facility and used oil/used oil filter transporter; RULES VIOLATED: 30 TAC §324.1 and 40 CFR §279.45(c), by failing to store used oil in non-leaking units; 30 TAC §324.1 and 40 CFR §279.45(d), (e), and (f), by failing to provide secondary containment for the used oil storage tank area; 30 TAC §324.1 and 40 CFR §279.45(g), by failing to label tanks containing used oil with the words "Used Oil"; 30 TAC §324.1 and 40 CFR §279.45(g), by failing to properly cleanup spills or discharges of used oil; 30 TAC §324.1 and 40 CFR §279.44(d) and §279.46(h), by failing to properly cleanup spills or discharges of used oil; 30 TAC §324.1 and 40 CFR §279.44(d) and §279.46(a), (b), and (c), by failing to retain records of rebuttable presumption analyses and records of used oil shipments and of all used oil accepted and delivered; 30 TAC §328.24(a), by failing to update used oil registration and the facility Notice of Registration (NOR) to reflect current owner/operator information; 30 TAC §328.24(e), by failing to have financial assurance for the proper closure of the facility; 30 TAC §328.25(c), by failing to make copies of the bills of lading available upon request by TCEQ personnel; and 30 TAC §335.6(6), by failing to update the NOR to reflect the current owner/operator status of the facility; PENALTY: $6,092; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(7) COMPANY: Salim Aziz Dossani dba Short Trip Food Mart; DOCKET NUMBER: 2008-1254-PST-E; TCEQ ID NUMBER: RN100860626; LOCATION: 8703 Boone Road, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(4) and §115.246(5) and THSC, §382.085(b), by failing to maintain Stage II Station representative certification and vapor recovery testing records at the Station and make them immediately available for inspection upon request by agency personnel; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; 30 TAC §334.49(c)(2)(C) and (4) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly and failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; 30 TAC §334.50(b)(1)(A), (2)(A)(i)(III), and (d)(1)(B)(ii) and TWC, §26.3475(a) and (c)(1), by failing to ensure

that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring), failing to test the line leak detectors at least once per year for performance and operational reliability, and failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; TCEQ AO Docket Number 2005-0365-PST-E, Ordering Provisions Number 2.b. and 30 TAC §334.74(2), by failing to investigate a suspected release within 30 days of discovery; TCEQ AO Docket No. 2005-0365-PST-E, Ordering Provision Number 2.a. and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; and 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; PENALTY: $65,088; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(8) COMPANY: South Texas Water Authority; DOCKET NUMBER: 2008-1016-PWS-E; TCEQ ID NUMBER: RN102683323; LOCATION: one mile west of the intersection of Highway 77 and CR 2010, Kingsville, Kleberg County; TYPE OF FACILITY: wholesale water supply system; RULES VIOLATED: 30 TAC §290.110(b)(4) and §290.46(d)(2)(B) and THSC, § 341.0315(c), by failing to maintain a residual disinfectant concentration of at least 0.5 milligrams per liter (mg/L) chloramine throughout the distribution system at all times; 30 TAC §290.46(f)(3)(A)(i)(II), by failing to maintain a record of the amount of chemical used each day; 30 TAC §290.121(a), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that can be made available at the time of commission inspections; 30 TAC §290.46(m)(1)(B), by failing to inspect the interior surface of the water system's pressure tanks every five years; 30 TAC §290.43(d)(2), by failing to provide all water system's pressure tanks with an easily readable pressure gauge; 30 TAC §290.43(c)(4), by failing to provide all water system's storage tanks with a liquid level indicator located at the tank site; 30 TAC §290.42(e)(3)(D), by failing to provide disinfection facilities for determining the amount of disinfectant used daily as well as the amount of disinfectant remaining for use; PENALTY: $4,455; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

TRD-200905419
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 23, 2009

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 4, 2010.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2010.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Alvin Cloud; DOCKET NUMBER: 2009-0135-MLM-E; TCEQ ID NUMBER: RN105159453; LOCATION: 6105 Avenue L, Santa Fe, Galveston County; TYPE OF FACILITY: real property; RULES VIOLATED: 30 TAC §111.201 and §330.15(c) and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent the unauthorized burning of approximately 40 cubic yards of material and the disposal of municipal solid waste; PENALTY: $1,580; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Angel Guzman; DOCKET NUMBER: 2009-0899-LII-E; TCEQ ID NUMBER: RN105716542; LOCATION: 5822 Chinaberry Drive, Houston, Harris County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: TWC, §37.003, Texas Occupations Code, §1903.251, and 30 TAC §30.5(a) and §344.4(a), by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing or servicing an irrigation system; PENALTY: $1,360; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Joey P. Dehart; DOCKET NUMBER: 2009-0579-WOC-E; TCEQ ID NUMBER: RN103647335; LOCATION: 2408 West Highway 90, Alpine, Brewster County; TYPE OF FACILITY: purchased drinking water distribution system; RULES VIOLATED: 30 TAC §30.5(a) and §30.381(b), THSC, §341.034(b), and TWC, §37.003, by failing to maintain a valid water operator license prior to performing activities as a water treatment operator; PENALTY: $500; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(4) COMPANY: Raj Construction L.L.C.; DOCKET NUMBER: 2009-0329-WQ-E; TCEQ ID NUMBER: RN105644710; LOCATION: 1581 Highway 380 Bypass, Graham, Young County; TYPE OF FACILITY:

general contractor on the construction site of a hotel; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activity; PENALTY: $1,050; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3696; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(5) COMPANY: Stafford Mobile Home Park, Inc.; DOCKET NUMBER: 2009-0667-MWD-E; TCEQ ID NUMBER: RN102080397; LOCATION: Stafford Run Creek, approximately 3,800 feet northeast of the intersection of Farm-to-Market Road 1092 and 5th Street, Stafford, Fort Bend County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014064001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with the permitted effluent limitations; 30 TAC §305.125(17) and TPDES Permit Number WQ0014064001, Monitoring and Reporting Requirements Number 1, by failing to submit the discharge monitoring reports for the monitoring periods ending May 31, 2008 and November 30, 2008; and 30 TAC §305.125(17) and TPDES Permit Number WQ0014064001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2008; PENALTY: $7,500; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200905420
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 23, 2009

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 101 and Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed additions to 30 Texas Administrative Code (TAC) Chapter 101. These additions are proposed under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning state implementation plans (SIPs).

The proposed rulemaking would implement the provisions of the Federal Clean Air Act (FCAA), Sections 182(d)(3) and (e) and 185, which require each SIP for ozone nonattainment areas classified as severe or extreme to include a requirement for the imposition of a penalty fee for major stationary sources of volatile organic compounds (VOC) located in the area if the area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. The rulemaking will also implement FCAA, Section 182(f), which requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO_x). The Houston-Galveston-Brazoria (HGB) area was classified as severe for both the one-hour ozone NAAQS and the 1997 eight-hour ozone NAAQS. The rulemaking will also provide for alternative options for the fee obligation and baseline amount calculations. Major stationary sources are subject to paying a fee of $5,000, as adjusted by the consumer price index, per ton in excess of 80 percent of a baseline amount of VOC or NO_x (or both.) The fee is proposed to be due annually until the area is redesignated attainment or has three years of data demonstrating attainment.

The commission will hold a public hearing on this proposal in Austin on January 5, 2010, at 2:00 p.m. in the TCEQ Campus, Bldg E, Room 201S, at 12100 Park 35 Circle. A second hearing will be held in Houston on January 6, 2010, at 2:00 p.m. in the Houston-Galveston Area Council at 3555 Timmons, Room A. The hearing will be structured for the receipt of oral or written comments. Registration begins 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established to assure enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available for discussion 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Charlotte Horn, Texas Register Team at (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2009-009-101-EN. The comment period closes January 11, 2010. To view rules, please visit *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information or questions concerning this proposal, please contact Kathy Pendleton, Emissions Assessment Section, at (512) 239-1936.

TRD-200905377
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 20, 2009

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Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Limited Scope Permit Amendment, Permit Number 956B

APPLICATION. City of Edinburg, Department of Solid Waste Management, P.O. Box 1079, Edinburg, Hidalgo County, Texas 78540-1079, has applied to the Texas Commission on Environmental Quality (TCEQ) for a municipal solid waste limited scope permit amendment to their current Type I landfill permit. The applicant is requesting Site Entrance relocation from Encinitos Road to Jasman Road to share facilities with the adjacent Type IV landfill and to improve safety. The facility is located at 900 Encinitos Road, Edinburg, Hidalgo County, Texas 78539. The TCEQ received the application on August 27, 2009. The permit amendment application is available for viewing and copying at the Edinburg City Hall, 415 West University Drive, Edinburg, Hidalgo County, Texas 78539.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us.

Further information may also be obtained from City of Edinburg at the address stated above or by calling Ms. Myra Ayala Garza, City Secretary at (956) 381-1851.

TRD-200905446
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 23, 2009

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Notice of Water Quality Applications

The following notices were issued on November 20, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

LONE STAR ETHANOL LLC proposes to operate Lone Star Ethanol, has applied for a renewal of TPDES Permit No. WQ0004835000, which authorizes the discharge of cooling tower and boiler blowdown, water treatment blowdown and treated sanitary sewage effluent at a daily average flow not to exceed 363,500 gallons per day via Outfall 001. The facility is located at the Port of Victoria Industrial Park, south of the City of Victoria, on Farm-to-Market Road 1432, approximately one mile southwest of State Highway 185 in the City of Victoria, Victoria County, Texas 77905.

CITY OF BRADY has applied for a major amendment to TPDES Permit No. WQ0010132001 to authorize the removal of effluent limitations and monitoring requirements for Total Silver and Cyanide. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,103,000 gallons per day. The facility is located 5,000 feet east of the intersection of U.S. Highway 87 and 7th Street in the City of Brady, on the west bank of Brady Creek in McCulloch County, Texas 76825.

CITY OF LA PORTE has applied for a major amendment to TPDES Permit No. WQ0010206001 to authorize an increase in the two-hour peak flow from 16.8 million gallons per day (MGD) to 21.8 MGD. The proposed amendment also authorizes removal of the irrigation authorization in the current permit. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 7,560,000 gallons per day. The facility is located at 1301 South 4th Street, approximately 0.2 mile south of the intersection of South 4th Street and Fairmont Parkway in Harris County, Texas 77571.

CITY OF FALLS CITY has applied for a renewal of TPDES Permit No. WQ0010398001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 65,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 26 acres non-public access agricultural land. The facility is located approximately 600 feet northwest of the intersection of Panna Maria Street and Maverick Street in the City of Falls City in Karnes County, Texas 78113.

CITY OF VICTORIA AND GUADALUPE BLANCO RIVER AUTHORITY have applied for a renewal of TPDES Permit No. WQ0010466001, which authorizes the discharge of treated domestic wastewater effluent at an annual average flow not to exceed

2,500,000 gallons per day. The facility is located on the east bank of the Guadalupe River, midway between Wharf Street and Peachtree Street, approximately 1.7 miles southwest of the intersection of U.S. Highways 59, 77 and 87 in the City of Victoria in Victoria County, Texas 77901.

THE CITY OF PALACIOS has applied for a renewal of TPDES Permit No. WQ0010593001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located approximately 1,800 feet west of the intersection of 12th Street and Moiser Drive in Matagorda County, Texas 77465.

FORT DAVIS WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0010971001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 123,000 gallons per day. The facility is located one mile south of State Highway 17, approximately 500 feet north of Cemetery Road and 0.5 mile east of Fort Davis in Jeff Davis County, Texas 79734.

RIVER PLACE MUNICIPAL UTILITY DISTRICT has applied for a renewal of TCEQ Permit No. WQ0011514001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 207,000 gallons per day via surface irrigation of 92 acres of golf course. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 4 miles northwest of the intersection of Farm-to-Market Road 2222 and State Highway - Loop 360, and 5/8 mile north of Lake Austin in Travis County, Texas 78730.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 285 has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0012716001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 750,000 gallons per day to an annual average flow not to exceed 1,150,000 gallons per day. The facility is located adjacent to the west bank of Carpenters Bayou, approximately one mile north of Wallisville Road Bridge and 2,800 feet east of East Belt Drive in Harris County, Texas 77049.

BENJAMIN SANJUAN has applied for a renewal of TPDES Permit No. 12919-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day. The facility is located on the 9800 Block of Deer Trail Drive approximately one mile northwest of the intersection of Farm-to-Market Road 149 and Interstate Highway 45 in Harris County, Texas.

OAK VALLEY MOBILE HOME PARK LLC has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014939001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility will be located at 4711 County Road 288, 1.3 miles north of the intersection of Angleton-Clute Road and Farm-to-Market Road 2004; approximately 1,750 feet west of Angleton-Clute Road in Brazoria County, Texas 77515.

WHITHARRAL WATER AND SEWER SERVICE SUPPLY CORPORATION has applied for a new permit, Proposed TCEQ Permit No. WQ0014942001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 35,500 gallons per day via surface irrigation of 78 acres of non-public access agricultural land. The facility was previously permitted under Permit No. WQ0013818001, which expired March 01, 2009. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 2,400 feet east of U.S. Highway 385 and 2,400 feet south of First Street in the Town of Whitharral in Hockley County, Texas 79380.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200905444
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 23, 2009

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Texas Facilities Commission

Request for Proposals #303-0-10727

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), announces the issuance of Request for Proposals (RFP) #303-0-10727. TFC seeks a ten (10) year lease of approximately 11,136 square feet of office space in Humble, Texas.

The deadline for questions is December 18, 2009, and the deadline for proposals is January 8, 2010, at 3:00 p.m. The award date is February 19, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=86077.*

TRD-200905379
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 20, 2009

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Request for Proposals #303-0-10797

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-0-10797. TFC seeks a five (5) year lease of approximately 5,387 square feet of office space in Donna, Weslaco or Mercedes, Hidalgo County, Texas.

The deadline for questions is December 11, 2009 and the deadline for proposals is December 22, 2009 at 3:00 p.m. The award date is February 17, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=86140.*

TRD-200905390

Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 20, 2009

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Request for Proposals #303-0-10819

The Texas Facilities Commission (TFC), on behalf of the Texas Parks and Wildlife Department (TPWD), announces the issuance of Request for Proposals (RFP) #303-0-10819. TFC seeks a five (5) year lease of approximately 441 square feet of office space in Leon County, Texas.

The deadline for questions is December 11, 2009 and the deadline for proposals is January 5, 2010 at 3:00 p.m. The award date is February 16, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=86149.*

TRD-200905388
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 20, 2009

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Office of the Governor

Request for Grant Applications for the Juvenile Accountability Block Grant Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting discretionary applications for projects that promote greater accountability in the juvenile justice system for the state fiscal year 2011 grant cycle.

Purpose: The purpose of the JABG Program is to reduce juvenile offending through accountability-based programs focused on the juvenile offender and the juvenile justice system.

Available Funding: Federal funds are authorized under the Omnibus Crime Control and Safe Streets Act of 2002, Public Law 107-273, 42 U.S.C. 3796 et seq. All grants awarded from this fund must comply with the requirements contained therein. All awards are subject to the availability of appropriated funds and any modifications or additional requirements that may be imposed by law.

Funding Levels: No minimum or maximum funding levels.

Required Match: Grantees must provide matching funds of at least ten percent (10%) of total project expenditures. This requirement must be met through cash contributions.

Standards: Grantees must comply with the standards applicable to this funding source contained in the *Texas Administrative Code,* Title 1, Part 1, Chapter 3 (1 TAC Chapter 3).

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official, except in the case of a juvenile court or drug court;

(4) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(5) vehicles or equipment for government agencies that are for general agency use;

(6) weapons, ammunition, explosives or military vehicles;

(7) admission fees or tickets to any amusement park, recreational activity or sporting event;

(8) promotional gifts;

(9) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement or social activities in any way;

(10) membership dues for individuals;

(11) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(12) fundraising;

(13) medical services; and

(14) construction.

Eligible Applicants:

(1) State agencies;

(2) Units of local government including crime control and prevention districts; and

(3) Native American Tribal Governments.

Requirements:

(1) Projects must address one or more of the following JABG Purpose Areas:

Juvenile Drug Courts: This solicitation invites communities to propose the implementation of a juvenile drug court program, using best practices in substance abuse treatment.

(2) In addition, all juvenile justice projects must address at least one of the following priorities:

Juvenile Justice Board Priorities - Juvenile justice projects or projects serving delinquent or at-risk youth will address at least one of the following priorities developed in coordination with the Governor's Juvenile Justice Advisory Board to be eligible for funding:

Prevention and Early Intervention at First Offense - Fund programs or other initiatives designed to positively impact youth prior to their involvement in the juvenile justice system or at their first offense and divert them from a path of serious, violent and chronic delinquency. Programs may include support for school resource officers, alcohol and substance abuse education, mentoring and after-school programs.

Disproportionate Minority Contact (DMC) - Decrease DMC, which exists if minority youth have a higher rate of contact with the juvenile justice system than do non-Hispanic white youth. Fund programs or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.

Gang Prevention and Intervention - Fund programs that address issues related to juvenile gang activity and the recruitment of juvenile

members. These issues include information sharing and prevention and intervention efforts directed at reducing gang-related activities.

Specialized Treatment Services - Fund programs that address the use and abuse of illegal substances, prescription and non-prescription drugs and alcohol. Counseling and professional therapy may also be provided to sex offenders and youth with anger management issues.

Juvenile Justice System Impact - Fund programs designed to impact offender accountability or improve the practices, policies or procedures within the juvenile justice system including rehabilitating and educating youth who have been involved in the juvenile justice system so that future involvement in criminal activity is deterred.

Project Period: Grant-funded projects must begin on or after September 1, 2010, and will expire on or before August 31, 2011.

Application Process: Applicants must access CJD's grant management website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to those applicants that demonstrate cost effective programs focused on proven or promising approaches to services provision.

Closing Date for Receipt of Applications: All applications must be certified via CJD's grant management website on or before February 12, 2010.

Selection Process: For state discretionary projects, applications are reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost effectiveness.

Contact Person: If additional information is needed, contact Ryan Clinton at ryan.clinton@governor.state.tx.us or (512) 463-1919.

TRD-200905423
Katherine Fite
Assistant General Counsel
Office of the Governor
Filed: November 23, 2009

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective January 1, 2010.

The amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid fee changes for the following services:

Physicians and Certain Other Practitioners

Durable Medical Equipment, Prosthetics, Orthotics and Supplies

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $6,766,378 for the remainder of federal fiscal year (FFY) 2010, with approximately $4,726,315 in federal funds and $2,040,063 in State General Revenue (GR). For FFY 2011, the estimated additional aggregate expenditure is $9,939,910, with approximately $5,747,194 in federal funds and $3,646,716 in GR.

Interested parties may obtain copies of the proposed amendment by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at Dan.Huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200905361
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: November 19, 2009

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective February 1, 2010.

The amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid fee changes for the following services:

Physicians and Certain Other Practitioners

Durable Medical Equipment, Prosthetics, Orthotics and Supplies

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $1,039,510 for the remainder of federal fiscal year (FFY) 2010, with approximately $726,098 in federal funds and $313,412 in State General Revenue (GR). For FFY 2011, the estimated additional aggregate expenditure is $1,618,783, with approximately $990,371 in federal funds and $628,412 in GR.

Interested parties may obtain copies of the proposed amendment by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at Dan.Huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200905362
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: November 19, 2009

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Henderson	East Texas Medical Center - Henderson	L06281	Henderson	00	11/04/09
Throughout TX	STS Construction Material Testing	L06280	Denison	00	11/05/09
Throughout TX	Dunagin Transport Company	L06272	Merkel	00	11/03/09
Throughout TX	Acosta Engineering Corporation	L06243	San Antonio	00	11/06/09
Throughout TX	Collier Consulting Inc.	L06287	Stephenville	00	11/05/09

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	100	11/04/09
Amarillo	Amarillo Cardiovascular Center P.C.	L05577	Amarillo	07	11/03/09
Austin	Asuragen Inc.	L05977	Austin	07	11/02/09
Bonham	Attentus Bonham L.P. dba Red River Regional Hospital	L03331	Bonham	39	11/06/09
Cedar Park	Cedar Park Health System L.P. dba Cedar Park Regional Medical Center	L06140	Cedar Park	03	10/31/09
Conroe	NRC Electronics Technologies L.L.C.	L06048	Conroe	01	11/03/09
Corpus Christi	CITGO Refining and Chemicals Company L.P.	L00243	Corpus Christi	46	11/05/09
Corpus Christi	Triad Isotopes Inc. dba Triad Isotopes - Corpus Christi	L05368	Corpus Christi	15	11/10/09
Dallas	Mallinckrodt Inc.	L03580	Dallas	67	11/03/09
Dallas	Presbyterian Cancer Center - Dallas L.L.C.	L06056	Dallas	02	11/06/09
Dallas	Cardinal Health	L05610	Dallas	14	11/10/09
Del Rio	Val Verde Regional Medical Center	L01967	Del Rio	32	11/05/09
Edinburg	Doctors Hospital at Renaissance Ltd. dba Doctors Hospital at Renaissance	L05761	Edinburg	21	11/10/09
Fort Worth	Fort Worth Heart P.A.	L05480	Fort Worth	30	11/06/09
Galveston	The University of Texas Medical Branch	L01299	Galveston	83	11/10/09
Houston	Domingo G. Gonzales Jr., M.D. P.A. dba Houston Metropolitan Cardiology Associates	L05283	Houston	10	10/30/09
Houston	Memorial Hermann Hospital System dba Memorial Hospital - Memorial City	L01168	Houston	112	10/30/09
Houston	The University of Texas M.D. Anderson Cancer Center	L06227	Houston	07	10/30/09
Houston	South Texas Nuclear Pharmacy	L05304	Houston	09	11/04/09
Huntsville	Huntsville Memorial Hospital	L02822	Huntsville	18	10/30/09
Jacksonville	Mother Frances Hospital - Jacksonville	L05362	Jacksonville	28	11/06/09
Lake Jackson	Brazosport Memorial Hospital	L03027	Lake Jackson	28	11/06/09
Lubbock	Lubbock Heart Hospital L.P.	L05742	Lubbock	08	10/30/09
McAllen	Valley Nuclear Incorporated	L04521	McAllen	28	11/05/09
McAllen	Cardiovascular Consultants of McAllen P.A.	L05126	McAllen	19	11/06/09
Mount Pleasant	Titus County Memorial Hospital	L02921	Mount Pleasant	33	10/30/09
Nacogdoches	Memorial Hospital	L01071	Nacogdoches	47	11/02/09
Olney	Olney Hamilton Hospital District dba Hamilton Hospital	L03226	Olney	19	11/03/09
Orange	Invista Inc.	L05777	Orange	06	11/03/09
Paris	Essent PRMC, L.P. dba Paris Regional Medical Center	L03199	Paris	50	11/02/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Rockdale	Luminant Generation Company L.L.C. dba Luminant Power	L04075	Rockdale	14	11/10/09
San Antonio	Methodist Healthcare System of San Antonio Ltd. LLP	L00594	San Antonio	262	10/30/09
San Antonio	Medi-Physics Inc. dba G.E. Healthcare	L04764	San Antonio	38	11/03/09
San Antonio	Heart and Vascular Institute of Texas	L04799	San Antonio	20	11/05/09
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	179	11/06/09
San Antonio	Methodist Healthcare System of San Antonio Ltd. LLP	L00594	San Antonio	263	11/06/09
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	122	11/06/09
San Antonio	Schnitzler Cardiovascular Consultants	L05792	San Antonio	07	11/09/09
Sugar Land	Schlumberger Technology Corporation	L05677	Sugar Land	06	10/29/09
Sugar Land	Methodist Sugar Land Hospital	L05788	Sugar Land	19	11/02/09
Temple	Specialty Pharmacy Services Inc.	L04883	Temple	27	11/03/09
Throughout TX	Desert Industrial X-Ray L.P.	L04590	Abilene	103	11/06/09
Throughout TX	Team Industrial Services Inc.	L00087	Alvin	211	11/04/09
Throughout TX	Texas Department of Transportation	L00197	Austin	149	11/02/09
Throughout TX	Reinhart and Associates Inc.	L03189	Austin	45	11/12/09
Throughout TX	Frac Tech Services Ltd.	L06188	Cisco	05	11/06/09
Throughout TX	Cardinal Health	L02048	Dallas	131	10/30/09
Throughout TX	Raba-Kistner Consultants (SW) Inc.	L02337	El Paso	26	11/04/09
Throughout TX	Digirad Imaging Solutions Inc.	L05414	Houston	32	11/09/09
Throughout TX	METCO	L03018	Houston	203	11/10/09
Throughout TX	Marco Inspection Services L.L.C.	L06072	Kilgore	26	11/02/09
Throughout TX	Acuren Inspection Inc.	L01774	La Porte	261	11/02/09
Throughout TX	Non-Destructive Inspection Corporation	L02712	Lake Jackson	140	11/04/09
Throughout TX	Midwest Inspection Services	L03120	Perryton	118	11/09/09
Throughout TX	Acosta Engineering Corporation	L06243	San Antonio	01	11/10/09
Throughout TX	Schlumberger Technology Corporation	L01833	Sugar Land	156	11/03/09
Throughout TX	Frost GeoSciences Inc.	L06015	San Antonio	03	11/05/09
Webster	CHCA Clear Lake L.P. dba Clear Lake Regional Medical Center	L01680	Webster	76	11/03/09

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	Headwaters Resources Inc.	L05281	Jewett	06	11/04/09

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Henderson	Henderson Memorial Hospital	L03466	Henderson	23	11/04/09
McAllen	Cardio Consulting L.L.C.	L05821	McAllen	04	10/31/09
Nederland	Lucite International Inc.	L06076	Nederland	02	11/09/09

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - MC 2835, P.O. Box 149347, Austin, TX 78714-9347. For information call (512) 834-6688.

TRD-200905325
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: November 19, 2009

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1227 "Great 8's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1227 is "GREAT 8'S". The play style is "row, column, diagonal with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1227 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1227.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, $$, $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $20.00, $100 and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1227 - 1.2D

PLAY SYMBOL	CAPTION
1	
2	
3	
4	
5	
6	
7	
8	
9	
$$	
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$20.00	TWENTY
$100	ONE HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off

play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $16.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00, $100 or $200.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1227), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1227-0000001-001.

K. Pack - A pack of "GREAT 8'S" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "GREAT 8'S" Instant Game No. 1227 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "GREAT 8'S" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) Play Symbols. If a player reveals three "8's" play symbols in any one row, column or diagonal, the player wins PRIZE shown. If a player reveals two "8's" play symbols and a double dollar "$$" play symbol in any one row, column or diagonal, the player wins DOUBLE the PRIZE shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No ticket will contain three or more of a kind other than the 8 play symbol.

C. No ticket will contain two matching play symbols appearing in a row, column or diagonal line other than the 8 play symbol.

D. The "$$" (doubler) play symbol will only be used to create a winning row, column or diagonal as dictated by the prize structure.

E. The "$$" (doubler) play symbol may only appear once on a ticket.

F. A ticket may only win once.

2.3 Procedure for Claiming Prizes.

A. To claim a "GREAT 8'S" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $16.00, $20.00, $40.00, $100 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00, $100 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "GREAT 8'S" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GREAT 8'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "GREAT 8'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "GREAT 8'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 9,120,000 tickets in the Instant Game No. 1227. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1227 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	668,800	13.64
$2	729,600	12.50
$4	273,600	33.33
$5	60,800	150.00
$8	91,200	100.00
$10	45,600	200.00
$16	15,200	600.00
$20	7,600	1,200.00
$40	1,900	4,800.00
$100	836	10,909.09
$200	456	20,000.00
$1,000	114	80,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.81. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1227 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1227, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200905324
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 18, 2009

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Notice of Public Comment Hearing

A public hearing to receive public comments regarding proposed amendments to 16 TAC §402.201 relating to Prohibited Bingo Occasion, proposed amendments to 16 TAC §402.203, relating to Unit Accounting, proposed amendments to 16 TAC §402.401 relating to Temporary License, proposed amendments to 16 TAC §402.402 relating to Registry of Bingo Workers, and proposed new 16 TAC §402.212 relating to Promotional Bingo will be held on Monday, December 14, 2009, at 9:00 a.m. at the Hobby Building, 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, and Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200905343
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 19, 2009

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Notice of Public Comment Hearing

A public hearing to receive public comments regarding proposed amendments to 16 TAC §401.402 relating to General Requirements, proposed amendments to 16 TAC §401.405 relating to Alternatives to Barrier Removal, and proposed amendments to 16 TAC §401.407 relating to Complaints Relating to Non-accessibility will be held on Monday, December 14, 2009, at 10:30 a.m. at the Hobby Building, 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, and Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200905344
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 19, 2009

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Notice of Public Comment Hearing

A public hearing to receive public comments regarding proposed new 16 TAC §401.317 relating to Powerball® On-Line Game Rule will be held on Monday, December 14, 2009, at 1:00 p.m. at the Hobby Building, 333 Guadalupe Street, Room 102, Tower III, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, and Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200905345
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 19, 2009

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North Central Texas Council of Governments

Request for Proposals for the City of Dallas 2011 Bike Plan

This request by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

The North Central Texas Council of Governments (NCTCOG) is requesting written proposals from consultant firms to create the City of Dallas 2011 Bike Plan. The 2011 Dallas Bike Plan will be the anticipated update to the 1985 Dallas Bike Plan. The Plan will identify key routes and facilities, prioritize project implementation areas for future funding, and provide consistent design of bicycle infrastructure throughout the city. The Plan will include a detailed map of the Dallas Bikeway System network coverage, generic and specific facility types and designs and an implementation strategy.

The primary objective of the Plan will be to enable through its implementation a safe and robust bicycle infrastructure network with connections to transit, major employers, and other desired destinations, responding to a long-standing demand for seamless transportation alternatives and a need to reduce greenhouse gas emissions and improve air quality. The Dallas Bikeway System will represent a major component of the overall transportation plan for Dallas, a city with a population of over 1.3 million people within a region (DFW) that contains a population of over 6 million people.

Due Date

Proposals must be received no later than 5 p.m., Central Daylight Time, on Friday, January 15, 2010, to Natalie Bettger, Senior Program Manager, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 or P.O. Box 5888, Arlington, Texas 76005-5888. For copies of the RFP, contact Therese Bergeon, at (817) 695-9267.

Contract Award Procedures

The firm or individual selected to perform these activities will be recommended by a Consultant Selection Committee (CSC). The CSC will use evaluation criteria and methodology consistent with the scope of services contained in the Request for Proposals. The NCTCOG Executive Board will review the CSC's recommendations and, if found acceptable, will issue a contract award.

Regulations

NCTCOG, in accordance with Title VI of the Civil Rights Act of 1964, 78 Statute 252, 41 United States Code 2000d to 2000d-4; and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 1, Nondiscrimination in Federally Assisted Programs of the Department of Transportation issued pursuant to such act, hereby notifies all proposers that it will affirmatively assure that in regard to any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit proposals in response to this invitation and will not be discriminated against on the grounds of race, color, sex, age, national origin, or disability in consideration of an award.

TRD-200905452
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: November 23, 2009

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Texas Public Finance Authority

Notice of Request for Information

The Texas Public Finance Authority announces its Request for Information to create a pool of qualified investment banking firms from which to obtain underwriting services to assist the Authority in its financings for the remainder of the biennium FY 2010-2011, and potentially for the FY 2012-2013 biennium. A copy of the RFI is available on the Authority's website, at www.tpfa.state.tx.us/RFP and on the Texas Electronic State Business Daily at esbd.cpa.state.tx.us. Interested firms may also contact the agency directly by email at: RFP@tpfa.state.tx.us.

The Board will base its selection on a firm's relevant experience, qualifications, and success in providing the services outlined in the RFI; the financial stability and strength as well as the firm's financial submission; the quality of the information provided regarding the requirements of the RFI; and any other factors relevant to the firm's capacity and ability to meet the Authority's and the State's needs. Proposals must be submitted by 5:00 p.m., CST, December 21, 2009.

TRD-200905373
Susan K. Durso
General Counsel
Texas Public Finance Authority
Filed: November 20, 2009

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 16, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Centrovision, Inc. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 37672 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the city limits of Little River Academy, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37672.

TRD-200905392

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 18, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Centrovision, Inc. for an Amendment to a State-Issued Certificate of Franchise Authority; Add City of Rogers, Project Number 37686 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the city limits of Rogers, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37686.

TRD-200905397
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 18, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority; Add City of Socorro, Project Number 37687 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the city limits of Socorro, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37687.

TRD-200905398
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on November 17, 2009, for waiver of denial by the Pooling Administrator (PA) of Verizon Southwest's (Verizon) request for assignment of numbering resources in the Hitchcock-Santa Fe rate center.

Docket Title and Number: Petition of Verizon Southwest for Waiver of Denial of Numbering Resources for Hitchcock-Santa Fe Rate Center, Docket Number 37682.

The Application: Verizon requested that the commission overturn a denial of numbering resources. Verizon applied for the numbering resources to satisfy a specific customer request. The PA denied the request because Verizon did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than December 14, 2009. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 37682.

TRD-200905393
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 19, 2009, to amend a certificate of convenience and necessity for a proposed transmission line in Denton County, Texas.

Docket Style and Number: Application of Brazos Electric Power Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line within Denton County. Docket Number 37616.

The Application: The application of Brazos Electric Power Cooperative, Inc. (Brazos Electric) is for a proposed transmission line designated the Mustang Tap Transmission Line Project. Brazos Electric proposes to design and construct a tap along the southern portion of the Mustang Loop project previously ordered by the commission in its final order dated November 8, 2007, in Docket Number 32871. The proposed line will be approximately two to four miles in length (preferred route). The estimated date to energize facilities is June 1, 2013.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is January 4, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 37616.

TRD-200905391

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Border to Border Telecommunications, Inc. (Border to Border) application filed with the Public Utility Commission of Texas (commission) on November 13, 2009, for approval of a minor rate change pursuant to P.U.C. Subst. R. §26.171.

Tariff Control Title and Number: Application of Border to Border Telecommunications, Inc. for Approval of a Minor Rate Change Pursuant to Subst. R. §26.171; Tariff Control Number 37666.

The Application: Border to Border filed an application to implement minor rate changes to revise its monthly Residential, Business rates, certain non-recurring service charges, Directory Assistance rates, Operator Service rates and to eliminate monthly charges for its Custom Calling services. The proposed effective date for the proposed rate changes is March 1, 2010. The estimated annual revenue increase recognized by Border to Border is $6,027 or less than 5% of Border to Border's gross annual intrastate revenues. Border to Border has 86 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by January 28, 2010, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by January 28, 2010. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 37666.

TRD-200905396
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Notice of Petition for Rulemaking

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition for rulemaking filed on November 16, 2009.

Project Style and Number: Petition of Rulemaking Regarding 811 Abbreviated Dialing Code; Project Number 37688.

Summary of Petition: The Texas Statewide Telephone Cooperative, Inc. (TSTCI) representing 38 individual local exchange carriers serving mostly small and rural service areas, filed a petition for rulemaking to clarify the rights and responsibilities of local exchange carriers to provide 811 service pursuant to P.U.C. Subst. R. 26.127, relating to Abbreviated Dialing Codes. Specifically, the petition seeks a rulemaking to address the relationship between local exchange carriers and the One-Call Board of Texas, which oversees the 811 service centers where 811 calls are routed. TSTCI asserts that the One-Call Board has refused to enter into an agreement for provision of 811 service, and has specifically disclaimed "customer" status as the term would apply for the purposes of the provision of Commission-approved tariff services. These tariffs include limitations of liability on the part of local exchange carriers for provision of 811 service, for claims or actions arising from such provision, arising from cause other than their own negligence. According to TSTCI, if the One-Call Board is not considered a customer under these Commission-approved tariffs, it exposes the local exchange carriers to unreasonable risk of liability or lawsuit for acts or omissions of others associated with the provision of 811 service other than those caused by their negligence.

The deadline to file comments in this project is Tuesday, December 29, 2009. Comments shall be filed at the Public Utility Commission of Texas, 1701 N. Congress, Austin, Texas 78701. Interested persons may contact the commission at (512) 936-7120 or (toll-free) 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Project Number 37688.

TRD-200905394
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2009

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Office of Public Utility Counsel

Notice of Annual Public Hearing

Pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §13.064 (Vernon 2007) (PURA), the Office of Public Utility Counsel (Office) is conducting its annual public hearing.

The public hearing will be held on the date and time, and at the location indicated below.

Wednesday, December 16, from 1:00 - 2:30 p.m.

Ripley House

4410 Navigation, Room 144

Houston, Texas 77011

All interested persons are invited to attend and provide input.

The Office represents the interest of residential and small commercial consumers in electric and telecommunications proceedings before the Public Utility Commission, Electric Reliability Council of Texas, courts, and other federal regulatory bodies. The Office seeks public input to assist the office in developing a plan of priorities, and in receiving comments on the office's functions and effectiveness.

Contact Danny Bivens, P.O. Box 12397, Austin, TX 78711-2397 or (512) 936-7500 for further information.

TRD-200905421
Don Ballard
Public Counsel
Office of Public Utility Counsel
Filed: November 23, 2009

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Mount Pleasant, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Mount Pleasant Regional Airport during the course of the next five years through multiple grants.

Current Project: The City of Mount Pleasant. TxDOT CSJ No. 0919MTPLS. Construct turnaround Runway 36; construct concrete helipad with lights and perimeter asphalt roadway; widen and mark Runway 17-35; widen Taxiway C; widen taxiway 19 radii; relocate MIRLs, PAPIs, REILs and signs at the Mount Pleasant Regional Airport.

The DBE goal for this project is 5%. TxDOT Project Manager is Harry Lorton, P.E.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Improve RSA/drainage to new C-II standards

The City of Mount Pleasant reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting "Mount Pleasant." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568).

The form may be emailed by request or downloaded from the TxDOT web site at

http://www.txdot.gov/business/projects/aviation.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than January 5, 2010, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at

http://www.txdot.gov/business/projects/aviation.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Harry Lorton, P.E., Project Manager.

TRD-200905380
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 20, 2009

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Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

http://www.txdot.gov/public_involvement/hearings_meetings.

Or visit www.txdot.gov, click on Public Involvement and click on Hearings and Meetings.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-200905381
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 20, 2009

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The University of Texas System

Request for Applications Concerning the Mathematics Regional Collaboratives Program, 2010-2011

The University of Texas in Austin, Texas Regional Collaboratives (TRC) for Excellence in Science and Mathematics Teaching

Filing Authority. The availability of grant funds is authorized by the No Child Left Behind Act of 2001, Title II, Part B, Mathematics and

Science Partnerships and the General Appropriations Act, Article III, Rider 38, 81st Texas Legislature, 2009.

Eligible Applicants. The TRC is requesting applications from partnerships that must include an engineering, mathematics, or science department of an institution of higher education (IHE) and a high-need local educational agency (LEA). They may also include another engineering, mathematics, science, or education department or college of an IHE; additional LEAs, public charter schools, public or private elementary schools or secondary schools, or a consortium of such schools; a business; or a nonprofit or for-profit organization of demonstrated effectiveness in improving the quality of mathematics and science teachers.

Description. The purpose of this notice is to solicit applications from eligible applicants to improve the academic achievement of students in mathematics through forming partnerships among institutions of higher education, local education agencies, elementary schools, and secondary schools. These partnerships will provide high quality, sustained, and high intensity professional development focused on the education of mathematics teachers as a career-long process. Such process should continuously stimulate intellectual growth of teachers and upgrade knowledge and skills of teachers through activities that are founded on scientifically based research and aligned with the Texas Essential Knowledge and Skills for Mathematics.

Dates of Project. Applicants should plan for a starting date of no earlier than May 1, 2010, and an ending date of no later than July 31, 2011.

Project Amount. An estimated $3,226,000 in funding is available for the Mathematics Regional Collaboratives Program for the 2010-2011 grant period. Funding will be provided for approximately 24 projects.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TRC reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

The TRC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TRC to pay any costs before an application is approved. The issuance of this RFA does not obligate TRC to award a grant or pay any costs incurred in preparing a response.

Further Information. For clarifying information about the RFA, please visit the TRC website at http://www.thetrc.org/trc or contact Amy Werst at (512) 471-7450.

Deadline for Receipt of Applications. Applications must be received in the TRC by 4:00 p.m. (Central Time), Friday, February 5, 2010 to be eligible to be considered for funding.

TRD-200905375
James P. Barufaldi
Director, Center for Science and Mathematics Education
The University of Texas System
Filed: November 20, 2009

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Request for Applications Concerning the Science Regional Collaboratives Program, 2010-2011

The University of Texas in Austin, Texas Regional Collaboratives (TRC) for Excellence in Science and Mathematics Teaching

Filing Authority. The availability of grant funds is authorized by the No Child Left Behind Act of 2001, Title II, Part B, Mathematics and Science Partnerships and the General Appropriations Act, Article III, Rider 38, 81st Texas Legislature, 2009.

Eligible Applicants. The TRC is requesting applications from partnerships that must include an engineering, mathematics, or science department of an institution of higher education (IHE) and a high-need local educational agency (LEA). They may also include another engineering, mathematics, science, or education department or college of an IHE; additional LEAs, public charter schools, public or private elementary schools or secondary schools, or a consortium of such schools; a business; or a nonprofit or for-profit organization of demonstrated effectiveness in improving the quality of mathematics and science teachers.

Description. The purpose of this notice is to solicit applications from eligible applicants to improve the academic achievement of students in science through forming partnerships among institutions of higher education, local education agencies, elementary schools, and secondary schools. These partnerships will provide high quality, sustained, and high intensity professional development focused on the education of science teachers as a career-long process. Such process should continuously stimulate intellectual growth of teachers and upgrade knowledge and skills of teachers through activities that are founded on scientifically based research and aligned with the Texas Essential Knowledge and Skills for Science.

Dates of Project. Applicants should plan for a starting date of no earlier than May 1, 2010, and an ending date of no later than July 31, 2011.

Project Amount. An estimated $4,839,000 in funding is available for the Science Regional Collaboratives Program for the 2010-2011 grant period. Funding will be provided for approximately 36 projects.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TRC reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

The TRC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TRC to pay any costs before an application is approved. The issuance of this RFA does not obligate TRC to award a grant or pay any costs incurred in preparing a response.

Further Information. For clarifying information about the RFA, please visit the TRC website at http://www.thetrc.org/trc or contact Amy Werst at (512) 471-7450.

Deadline for Receipt of Applications. Applications must be received in the TRC by 4:00 p.m. (Central Time), Friday, February 5, 2010 to be eligible to be considered for funding.

TRD-200905374
James P. Barufaldi
Director, Center for Science and Mathematics Education
The University of Texas System
Filed: November 20, 2009

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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 34 (2009) is cited as follows: 34 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "34 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 34 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).